Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE,
AND STEVEN P. BARBA,

Petitioners,

v.

PATRICIA CARTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an official of a public university violate the First and Fourteenth Amendments when she imposes a viewpoint-based system of prior restraint on the publication of a newspaper produced by adult students outside the university's educational curriculum?

2. Is an official of a public university entitled to qualified immunity from liability pursuant to 42 U.S.C. § 1983 when she imposes a viewpoint-based system of prior restraint on the publication of a newspaper produced by adult students outside the university's educational curriculum?

3. Does this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), either authorize an official of a public university to impose a viewpoint-based system of prior restraint on a newspaper produced by adult students outside the university's educational curriculum, or limit the otherwise clearly established right of adult university students to be free from such a system of prior restraint in the publication of such a newspaper?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Margaret L. Hosty, Jeni S. Porche and Steven P. Barba respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit sitting *en banc* is reported at 412 F.3d 731 and is reprinted in the Appendix. The earlier decision of a panel of the Seventh Circuit is reported at 325 F.3d 945 and is reprinted in the Appendix. The opinions of the United States District Court for the Northern District of Illinois are reported at 174 F. Supp. 2d 782 and 2001 WL 1465621 and are reprinted in the Appendix.

JURISDICTION

The decision of a panel of the Court of Appeals was rendered on April 10, 2003. The Court of Appeals granted Respondent's petition for rehearing *en banc* on June 25, 2003. The judgment of the Court of Appeals, sitting *en banc*, was entered on June 20, 2005. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 are reproduced in the Appendix at 60a-62a.

STATEMENT OF THE CASE

1. Statement of Facts

Petitioners Jeni S. Porche, Margaret L. Hosty and Steven P. Barba served, respectively, as editor-in-chief, managing editor, and staff reporter of the *Innovator*, a student-operated newspaper at Governors State University (the "University") in University Park, Illinois. App. 26a; *see also* App. 2a-3a.[1] The University is a publicly funded institution of higher education chartered by the Illinois General Assembly. Its Board of Trustees is appointed by the Governor, with the exception of one student member, who is elected by the student body. App. 50a; *see also* App. 3a. The University offers undergraduate courses leading to completion of a baccalaureate degree and graduate level courses leading to a master's degree. *See Governors State University, Facts & Figures*, www.govst.edu/aboutgsu/t_aboutgsu.asp?id=204 (last visited Sept. 9, 2005) ("*Governors State University, Facts & Figures*").

The University admits only students who are, in effect, in their junior or senior years of undergraduate study. For admission to the University, a prospective student must

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[1] References to the Appendix to this Petition are denoted as "App." The decision below was rendered in the context of Respondent's motion for summary judgment, in which she argued that she was entitled to qualified immunity from liability pursuant to 42 U.S.C. § 1983. Accordingly, "[b]ecause this case arises in the posture of a motion for summary judgment, [this Court is] required to view all facts and draw all reasonable inferences in favor of the nonmoving party." *Brosseau v. Haugen*, 125 S. Ct. 596, 597 n.2 (2004). *See also, e.g., Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) ("the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the [qualified immunity] inquiry"); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982) ("a court ordinarily must look at the record in the light most favorable to the party opposing [qualified immunity], drawing all inferences favorable to that party").

possess at least an associate's degree from another institution of higher education or, alternatively, must have earned at least sixty semester hours of academic credit at another such institution. *See Governors State University, Undergraduate Admissions Requirements*, www.govst.edu/apply/undergrad.htm (last visited Sept. 9, 2005). In total, the University offers some forty-seven degree programs at the undergraduate and graduate level. *See Governors State University, Facts & Figures*. Student enrollment is approximately 6,000. *See id.* The average age of students at the University, which describes itself as a "campus for working adults," is thirty-three. *Governors State University, About GSU,* www.govst.edu/aboutgsu/t_aboutgsu.asp?id=191 (last visited Sept. 9, 2005); *Governors State University, Facts & Figures.* All three Petitioners were older than twenty-one at all times relevant to this proceeding, *see* Dep. of M. Hosty, Aug. 2, 2001, at 5:15-18; Dep. of J. Porche, Aug. 2, 2001, at 5:15-18; Dep. of S. Barba, Aug. 8, 2001, at 5:20-21.

Petitioners were appointed to their respective editorial positions at the *Innovator* by the University's Student Communications Media Board (the "SCMB") in May 2000. App. 26a; *see also* App. 11a. The SCMB, the members of which were selected by the Student Senate, also approved the *Innovator*'s budget. App. 11a. The costs incurred in publishing the *Innovator* are funded by an "activity fee" paid by all University students as well as advertising revenues generated by the newspaper. *See* App. 11a; *see also* App. 26a.[2] Pursuant to a contract with a private printing company,

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[2] In the university context, student activity fees are typically mandatory student assessments and the money collected "goes to a special fund from which any group of students with [university recognition] can draw for purposes consistent with the University's educational mission; and to the extent the student is interested in speech, withdrawal is permitted to cover the whole spectrum of speech." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995); *see also id.* at 851 (O'Connor, J.,

the *Innovator* was to be published on a bi-monthly basis. App. 36a; *see also* App. 2a, 27a.

Pursuant to the University's established practices and policies, the student staff of the *Innovator* and other student-operated publications retained unfettered authority to "'determine [the] content and format of their respective publications *without censorship or advance approval.*'" App. 26a (citation omitted); *see also* App. 11a, 35a. Participation on the *Innovator*'s staff was a voluntary, extracurricular activity unconnected to any particular course of study or classroom activity. App. 8a; *see also* App. 24a, 47a. Although the newspaper had an adviser who also served on the University's faculty, he "did not make content decisions" but instead reviewed stories intended for publication at the request of the *Innovator*'s editors to advise them "on issues of journalistic standards and ethics." App. 27a, 35a. Thus, "the student editors and writers [were] given complete editorial control over the newspaper, including its subject matter and content." App. 35a. Indeed, as the University president acknowledged, "the newspaper would be reviewed, looked at by the faculty advisor but in no sense would the faculty advisor have a right to approve." Dep. of S. Fagan, Aug. 9, 2001, at 58:11-14; *see also id.* at 59:4-8 ("There may be some process of review where the faculty

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concurring in judgment) ("Unlike moneys dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee."); *see generally Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (upholding constitutionality of student activity fee mechanism against First Amendment challenge where funds are disbursed to campus organizations on viewpoint-neutral basis and distinguishing circumstances in which "the challenged speech . . . [is] financed by tuition dollars and the University and its officials [are] responsible for its content" such that "the case might be evaluated on the premise that the government itself is the speaker").

advisor works with the students to make suggestions, but I don't think the advisor has a right to approve in the sense of preventing the newspaper from being printed."). The *Innovator* itself proclaims on its masthead that it "is edited and published by the students" and that the "views expressed in" the newspaper "may not reflect the views . . . of Governors State University, and should not be regarded as such." Dep. of J. Porche, Exh. 3, at 3.

Between July and November 2000, the *Innovator* published four issues, Dep. of J. Porche, Aug. 2, 2001, at 31:21-32:17, all of which included articles that addressed controversial issues of importance to the University community, *see* App. 20a. One such article singled out the dean of the University's College of Arts and Sciences for particular criticism in the wake of the University's decision not to renew the teaching contract of the *Innovator*'s adviser. App. 2a. A column published in the newspaper rebuked the University's financial aid office, *see* Dep. of J. Porche, Exh. 3, at 4, which is supervised by Respondent Patricia Carter, the University's Dean of Student Affairs and Services, *see* Dep. of P. Carter, Aug. 9, 2001, at 25:7. Another article reported student complaints lodged against the coordinator of the University's English Department, including a lack of varied course offerings, the hiring of unqualified instructors and racial bias in grading. *See* App. 2a.

In the wake of the publication of such articles, the University's president and the dean of the College issued public statements "accusing the *Innovator* of irresponsible and defamatory journalism." App. 2a. The University's president complained that the newspaper had "excoriated some members of the university faculty and administration (myself included)." Dep. of S. Fagan, Exh. 2. The president further alleged that the newspaper's reporting, which he characterized as "one-sided," "inaccurate," and "insulting,"

had "sullied" the reputation "of the university and its faculty." *Id.*

In late October and again in early November 2000, Dean Carter placed telephone calls to the company that printed the *Innovator* "on behalf of the [University] administration and ordered [it] not to print the Innovator without prior approval of the newspaper's content by a [University] administrator." App. 37a; *see also* App. 2a, 27a. Although the owner of the printing company expressly admonished Dean Carter that such an order was "probably unconstitutional," she insisted that he "call her personally before printing the next issue of the newspaper and reminded him that [the University] paid" the *Innovator*'s printing bill. App. 37a.

Upon learning of Dean Carter's demand, Petitioners refused to submit the *Innovator* to the University administration for its review and approval prior to publication. App. 2a. For its part, the printing company was unwilling to publish future issues that had not been approved as Dean Carter had required because it "was not willing to take the risk that it would not be paid." App. 2a. As a result, publication of the *Innovator* ceased in November 2000. App. 2a-3a.

2. Proceedings Below

In January 2001, Petitioners filed this civil action in the United States District Court for the Northern District of Illinois seeking declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983. *See* App. 49a. Petitioners alleged that the University, its trustees, Dean Carter and other administrators had violated their First and Fourteenth Amendment rights by, *inter alia*, imposing an unconstitutional system of prior restraint on the newspaper's publication. App. 49a. In April 2001, the district court granted the University's motion to dismiss the complaint on

the ground that, as a state agency, it was immune from suit by operation of the Eleventh Amendment. App. 52a.

The remaining defendants ultimately moved for summary judgment on various grounds. In November 2001, the district court granted summary judgment to each of the remaining defendants, with the exception of Dean Carter. App. 48a. With respect to her, the district court held that there was "a disputed issue of material fact as to whether Dean Carter's asserted conduct violated plaintiffs' clearly established First Amendment rights" so as to preclude summary judgment. App. 47a. Relying on, *inter alia*, the Fourth Circuit's decision in *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), the district court concluded that Dean Carter "was not constitutionally permitted to take adverse action against the newspaper because of its content." App. 47a.

In so holding, the district court rejected Dean Carter's contention that this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permitted University officials to insist upon prior approval of the *Innovator*'s content as a condition precedent to its dissemination on campus. App. 47a. The district court also rejected Dean Carter's related argument that this Court's decision in *Hazelwood* could reasonably be construed as "cast[ing] doubt" on the scope of First Amendment protection afforded to student journalists in the university context such that, even if Dean Carter had imposed a system of prior restraint in violation of the First Amendment, she was nonetheless entitled to qualified immunity because the unconstitutionality of her conduct was not "clearly established" at the time. App. 47a. According to the district court, *Hazelwood* was inapplicable because it involved "a high school newspaper that was part of a journalism class. . . . Here, however, all editorial decisions were made by

student editors and the Innovator was not part of a class, but an autonomous student organization." App. 47a.

Dean Carter thereafter pursued an interlocutory appeal. App. 26a. Framing the question before it as "whether the principles of *Hazelwood* apply to public college and university students" so as to excuse Dean Carter's conduct, a three-judge panel of the Seventh Circuit affirmed the district court's decision. App. 26a.[3] "While *Hazelwood* teaches that younger students in a high school setting must endure First Amendment restrictions," the panel concluded, "we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level." App. 32a. The panel observed that:

> [f]or several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. . . . Attempts by school officials, like Dean Carter here, to censor or control constitutionally protected expression in student-edited media have consistently been viewed as suspect under the First Amendment.

App. 28a (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*)).

Dean Carter petitioned the Court of Appeals for rehearing *en banc*. *See* App. 59a. The full Court of Appeals granted the petition, vacated the panel's decision and, in an opinion by Judge Easterbrook on behalf of seven of that court's eleven judges, held that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools." App. 7a. In so holding,

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[3] Petitioners appeared *pro se* in the Court of Appeals.

the Court of Appeals majority concluded that "there is no sharp difference between high school and college papers" with respect to the pedagogical need for administrators to "ensure 'high standards for the student speech that is disseminated under [the school's] auspices'" or to "dissociat[e] the school from 'any position other than neutrality on matters of political controversy,'" App. 6a (citing *Hazelwood*, 484 U.S. at 271, 272) (first alteration in original), even when the student speech at issue takes place separate and apart from the educational curriculum.

The majority of the *en banc* court further reasoned that university students such as Petitioners, all of whom had reached the age of majority, are not entitled to any greater rights under the First Amendment than the high school students before this Court in *Hazelwood*. *See* App. 6a. ("[M]any high school seniors are older than some college freshmen, and junior colleges are similar to many high schools."). By the same token, the majority determined that the *Innovator*'s status as a student-run extracurricular activity divorced from any academic classroom program did not entitle it to any greater First Amendment protection against prior restraints than the publication at issue in *Hazelwood*, which had been produced by a high school journalism class as part of the educational curriculum. *See* App. 13a (rejecting contention that "only speech that is part of the [educational] curriculum is subject to" restriction).

Finally, the Court of Appeals majority held that, even if the *Innovator* constituted a "public forum" within which the University could not constitutionally "'censor speech,'" App. 12a (citation omitted), Dean Carter was nevertheless entitled to qualified immunity because the resolution of that issue was sufficiently "cloudy" that her conduct could not be said to violate Petitioners' "'clearly established'" rights. App. 11a, 13a (citation omitted). According to the court:

> Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator*'s printing bill violated the first amendment.

App. 14a-15a.

Four judges dissented and joined in a single opinion by Judge Evans. App. 15a. In their view, the majority had improperly extended the holding of *Hazelwood* to a university setting and, in so doing, had "applie[d] limitations on speech that the Supreme Court created for use in the *narrow* circumstances of elementary and secondary education." App. 15a. The dissenting judges rejected the majority's conclusion that anything in this Court's decision in *Hazelwood* either altered the pre-existing constitutional law that governed Dean Carter's conduct or rendered that law sufficiently "cloudy" to entitle her to qualified immunity:

> The *Innovator*, as opposed to writing merely about football games, actually chose to publish hard-hitting stories. And these articles were critical of the school administration. In response, rather than applauding the young journalists, the University decided to prohibit publication unless a school official reviewed the paper's content before it was printed. Few restrictions on speech seem to run more afoul of basic First Amendment values.

App. 20a.

REASONS FOR GRANTING THE WRIT

More than thirty years ago, this Court held that officials at a public university must operate within the confines of the First and Fourteenth Amendments and are precluded, as are all public officials who act "as the instrumentality of the State," from infringing the fundamental rights of college and university students to freedom of speech and of the press. *Healy v. James*, 408 U.S. 169, 187-88 (1972). Since then, both this Court and the courts of appeals have consistently re-affirmed this well-settled law. *See, e.g.*, *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (university's expulsion of student for disseminating student newspaper it deemed indecent violated First and Fourteenth Amendments); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) (university may not withdraw support for student newspaper because it disagrees with views expressed therein); *Bazaar v. Fortune*, 476 F.2d 570, 572, 580 (5th Cir. 1973) (university may not prevent publication and distribution of student publication on grounds that it contained language that was "inappropriate" or "in bad taste").

In this case, however, the Seventh Circuit embraced the contention of a university official that this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), altered this well-established constitutional calculus and excused her decision to impose a system of prior restraint on the publication of a student-operated newspaper produced by and for adult students outside the University's educational curriculum. That decision conflicts with *Healy* and its progeny in this Court as well as with the holdings of several courts of appeals that the First and Fourteenth Amendments preclude university officials from censoring student newspapers in this manner. Moreover, the Seventh Circuit's

decision has exacerbated the recent palpable confusion in the lower courts concerning the reach of this Court's holding in *Hazelwood* in a manner that threatens to restrict substantially the freedom of expression on college and university campuses throughout the nation.

I. THE DECISION BELOW CONFLICTS WITH *HEALY v. JAMES* AND ITS PROGENY

In *Healy v. James*, 408 U.S. at 187-88, this Court held that a public university, "acting . . . as the instrumentality of the State," is obliged to respect the First and Fourteenth Amendment rights of the students who attend such institutions. Rejecting the contention of a college president that he could deny recognition to a campus chapter of a controversial political group, the Court held that the president's decision, which rested on his assessment of the views that the group espoused, "was a form of prior restraint" forbidden by the First Amendment. *Id.* at 184. In so holding, the Court emphasized that it was applying "well-established First Amendment principles." *Id.* at 170. All nine justices joined in the Court's judgment and eight of them joined in Justice Powell's opinion, which explained that:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

Id. at 180-81 (citations omitted).

The following term, in *Papish v. Board of Curators*, 410 U.S. at 667, the Court extended the First Amendment rights articulated in *Healy* to student-operated newspapers published on college campuses. In *Papish*, a university student challenged her expulsion from school for distributing a newspaper that administrators deemed "indecent." *Id.* at 668. Holding that the expulsion violated the First and Fourteenth Amendments, this Court explained in a *per curiam* opinion that "the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Id.* at 670 (citation omitted). The Court reiterated its admonition to university officials in *Healy* that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." *Id.* at 671.

In the more than three decades following *Healy* and *Papish*, this Court has never deviated from this view of the First Amendment's proper application in the college and university setting. Thus, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court held that the First Amendment precludes university administrators from denying funding to student-operated publications, produced as extracurricular activities, based on the views expressed in those publications. In *Rosenberger*, a group of students at the University of Virginia published a newspaper, *Wide Awake*, which espoused Christian views. *Id.* at 825-26. The University had established a student activities fund into which all students paid a mandatory fee. *See id.* at 824-25. Pursuant to certain guidelines, the student council was then authorized to disburse monies from the fund to student organizations, including organizations disseminating student publications. *See id.* When the

students who published *Wide Awake* sought permission to tap the student activities fund to reimburse a printer for the cost of producing their newspaper, the student council and, subsequently, the university's dean of students, denied their request because the newspaper promoted a particular religious viewpoint in violation of university guidelines. *Id.* at 827. This Court concluded that, "[h]aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." *Id.* at 835. As the Court explained:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Id. at 835 (citing, *inter alia*, *Healy*, 408 U.S. at 180-81).

The Seventh Circuit's decision in this case cannot be reconciled with *Healy* and its progeny.[4] The court's opinion

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[4] In this regard, it cannot reasonably be disputed that Dean Carter's conduct – *i.e.*, her imposition, in the wake of the newspaper's published criticism of the University's administration, of a requirement that she review and approve each issue of the *Innovator* prior to its publication – constitutes "the most serious and the least tolerable infringement on First Amendment rights" known to our law. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) ("[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where

fails to address or even cite either *Healy* or *Papish* and references *Rosenberger* only in passing. App. 6a, 11a. Instead, the Court of Appeals relies entirely on this Court's decision in *Hazelwood* and expressly "hold[s]" that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools." App. 7a. As a result, the Seventh Circuit accepted Dean Carter's contention that *Hazelwood* excused her decision to impose a system of prior restraint on the publication of a student-operated newspaper at a public university because it had previously published articles critical of the university's administration and the decisions it had made.

Indeed, the Seventh Circuit's reliance on *Hazelwood* came at the invitation of Dean Carter, who invoked that decision both to justify her conduct as constitutionally permissible and to support her contention that, even if she had violated the Petitioners' First Amendment rights, those rights were not "clearly established" at the time she acted. *See* App. 47a. Nothing this Court held or wrote in *Hazelwood*, however, detracts from its holdings in *Healy* and *Papish* or even arguably operates to excuse the otherwise unconstitutional conduct in which Dean Carter engaged in this case for three fundamental reasons.

First, the Court in *Hazelwood* addressed only the constitutional limitations imposed by the First and Fourteenth Amendments in public high schools, not in the college or university setting before the Court in *Healy*, *Papish* and *Rosenberger*. Thus, while the Court emphasized in *Healy*

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officials have unbridled discretion over a forum's use"); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) (ordinance requiring license to distribute written materials of any kind within city limits "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship").

that First Amendment protections apply with no "less force on college campuses than in the community at large," 408 U.S. at 180, in *Hazelwood*, the Court retrenched from that view not at all, but rather reached the distinct conclusion that educators *in the secondary school context* "must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics." 484 U.S. at 272. As a result, the Court held in *Hazelwood* only that *high school educators* "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.[5]

The distinction that this Court has drawn between the First Amendment rights enjoyed by high school students, on the one hand, and university students, on the other, flows from the fact that the vast majority of high school students are minors, while virtually all college and university students are adults.[6] In no small part because, "during the formative

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[5] That said, while the First Amendment may permit high school administrators to impose some restrictions on certain expressive activities, secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In *Tinker*, for example, this Court held that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible," even in a public high school. *Id.* at 511.

[6] Only one percent of those enrolled in American colleges or universities are under the age of 18, while 55 percent are 22 years of age or older. App. 31a. *See Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("[u]niversity students are, of course, young adults" and "are less impressionable than younger students"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429-30 (1992) (Stevens, J., concurring in judgment) ("the

years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), secondary school educators have very different roles and responsibilities than their college and university counterparts. Thus, while the university campus is intended to be a caldron of "'speculation, experiment and creation,'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (citation omitted), "[t]he role and purpose of the American public school system" is, in contrast, to "'inculcate the habits and manners of civility as values in themselves . . . and as indispensable to the practice of self-government in the community and the nation,'" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (citation omitted).

Second, the Court's decisions in *Healy* and its progeny all involved expressive activity that, though subsidized or authorized in some manner by a public university, was not undertaken as part of the educational curriculum. *See Healy*, 408 U.S. at 176 (use of campus meeting rooms and bulletin boards by extracurricular student group that espoused controversial views); *Papish*, 410 U.S. at 667 (distribution of student newspaper on campus with university permission); *Rosenberger*, 515 U.S. at 826-27 (student activity fee subsidy

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distinctive character of a university environment, or a secondary school environment, influences our First Amendment analysis") (citations omitted); *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring in judgment) ("[l]egislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults"); *Bd. of Regents of the Univ. of Wis. Sys.*, 529 U.S. at 238 n.4 (Souter, J., concurring in judgment) (this Court's "cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education") (citations omitted).

for student-produced publication espousing religious views).[7] In *Hazelwood*, in contrast, the newspaper at issue was written and edited by students in the context of a high school journalism class. 484 U.S. at 262-63. The journalism class "was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course" and the teacher "'was the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content.'" *Id.* at 268 (citation omitted).

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[7] As this case illustrates, those college and university newspapers published separate and apart from the educational curriculum as an *extra-curricular* activity are, even when funded by student activity fees, operated as limited public fora in which the educational institutions themselves, both formally and through historical practice, have relinquished any right to act as a traditional "publisher" and control the newspaper's editorial content. *See, e.g.*, Mark J. Fiore, *Trampling The "Marketplace of Ideas": The Case Against Extending Hazelwood To College Campuses*, 150 U. Pa. L. Rev. 1915, 1962 (2002) ("most college publications are under the primary control of students, with little or no oversight from college officials"). This is hardly surprising since, except in those instances in which a newspaper is produced as part of a journalism curriculum, its very purpose is to afford students the opportunity to act as *journalists* and the university community the ability to receive news and information about the university uncensored by the institution itself. Accordingly, the Seventh Circuit's conclusion that an official in Dean Carter's position could reasonably be surprised to learn that a student newspaper such as the *Innovator* constituted a limited public forum immune from University interference with its editorial content is refuted both by the *Innovator*'s undisputed status as a student activity operated apart from the educational curriculum and the undisputed record in this case. *See, e.g.*, Dep. of S. Fagan, at 59:4-8 (University President acknowledges that no administrator, including the newspaper's adviser, "has a right to approve [the *Innovator*'s content] in the sense of preventing the newspaper from being printed").

Emphasizing these facts, this Court in *Hazelwood* concluded that the high school newspaper at issue in that case was a curricular activity, "a supervised learning experience for journalism students." *Id.* at 270. For that reason as well, the Court concluded that high school administrators "were entitled to regulate the contents of [the newspaper] in any reasonable manner." *Id.* Indeed, in *Hazelwood*, the Court explicitly stated that the only question it confronted in that case was "the extent to which educators may exercise editorial control over the contents of a *high school newspaper produced as a part of the school's journalism curriculum*" and it expressly disclaimed any intention of deciding "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 262, 273 n.7 (emphasis added).

Third, although the Seventh Circuit purports to rest its decision on the power invested in school officials to regulate student expression by this Court's decision in *Hazelwood*, as Dean Carter had urged, *see* App. 3a (asserting that *Hazelwood* "holds that faculty may supervise and determine the content of a student newspaper"), in the end, it did no such thing. Rather, following its express holding that "*Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools," App. 7a, the Court of Appeals proceeded to conclude, as it was obliged to do given the procedural posture of the case and the record evidence, *see* note 1 *supra*, that – as an extracurricular activity operated separate and apart from the University's educational curriculum – the *Innovator* constituted a "public forum" and Dean Carter was therefore constitutionally prohibited from subjecting it to a system of prior restraint, *see* App. 10a (conceding that reasonable trier of fact could conclude that "the *Innovator* operated in a public forum and thus was beyond the control

of the University's administration"). In the wake of this necessary concession, there is simply no principled basis on which to distinguish this case from *Healy*, *Papish* or *Rosenberger* or to conclude that this Court's decision in *Hazelwood* somehow excused Dean Carter's actions in violation of the law on this subject "clearly established" in *Healy* and its progeny.

In the last analysis, therefore, the Seventh Circuit's decision in this case cannot be reconciled with *Healy* or with the litany of subsequent cases in which this Court has held that the First and Fourteenth Amendments protect students at public colleges and universities from official interference with the exercise of their rights of free expression when undertaken separate and apart from the educational curriculum itself.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL APPELLATE COURTS

For the same reasons discussed *supra*, the Seventh Circuit's decision conflicts with the holdings of the several courts of appeals that have faithfully applied this Court's decisions in *Healy* and its progeny for the last three decades. As Judge Evans noted in his dissenting opinion below, "[p]rior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers. *Hazelwood* did not change this well-established rule." App. 21a (citations omitted).

Thus, for example, in *Joyner v. Whiting*, 477 F.2d at 460, the Fourth Circuit held unconstitutional the decision of a university president to withdraw financial support from the school's official student newspaper in the wake of its publication of a controversial editorial. The Fourth Circuit explained that:

> It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.

Id. *See also id.* ("Censorship of constitutionally protected expression cannot be imposed [at a college or university] by suspending the editors [of student newspapers], suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse.").

Similarly, in *Bazaar v. Fortune*, 476 F.2d 570, 574 (5th Cir. 1973),[8] the Fifth Circuit held that officials at the University of Mississippi violated its students' First Amendment rights when they prohibited the publication of a student literary magazine. In so ruling, the court reiterated the "well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees." *Id.* at 574. *See also, e.g.*, *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*) (holding that university officials violated First Amendment by confiscating student yearbooks); *Student Gov't Ass'n v. Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (*Hazelwood* "is not applicable to college newspapers"); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) ("A public university may not constitutionally

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[8] The opinion was affirmed *en banc* with minor modification. *Bazaar v. Fortune*, 489 F.2d 225 (5th Cir. 1973).

take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper"); *Schiff v. Williams*, 519 F.2d 257, 260-61 (5th Cir. 1975) (university's firing of student editors because of university's objections to the newspaper's "poor grammar, spelling and language expression" violated First Amendment).[9]

The panel below was, therefore, certainly correct when it noted that, "[f]or several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections" and that "school administrators can only censor student media if they show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content." App. 28a. The Seventh Circuit's decision in this case, in contrast, stands in direct conflict with this body of precedent.

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[9] *Cf. Sinn v. The Daily Nebraskan*, 829 F.2d 662, 663 (8th Cir. 1987) ("where student publications of state-supported universities are concerned, editorial freedom of expression has consistently triumphed over attempts at censorship"). The lower federal courts are in accord. *See, e.g., Am. Civil Liberties Union of Va., Inc. v. Radford College*, 315 F. Supp. 893, 896-97 (W.D. Va. 1970) ("[A] state university [may not] support a campus newspaper and then try to restrict arbitrarily what it may publish, even if only to require that material be submitted to a faculty board to determine whether it complies with 'responsible freedom of press.'"); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("[I]n cases concerning school-supported publications . . . the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process").

III. THE DECISION BELOW COMPOUNDS THE CONFUSION IN THE LOWER COURTS FOLLOWING *HAZELWOOD v. KUHLMEIR* AND BROADLY THREATENS FREE EXPRESSION AT PUBLIC COLLEGES AND UNIVERSITIES

Following *Hazelwood*, the courts of appeals have struggled mightily to assess its impact in a variety of contexts. These cases have spawned a host of conflicting analyses, multiple dissenting opinions in individual cases, and *en banc* rehearing in two circuits, including the Seventh Circuit's decision in this case. At this juncture, therefore, this Court's further guidance is both appropriate and necessary.

In *Kincaid v. Gibson*, 236 F.3d 342, 345 (6th Cir. 2001), for example, the Sixth Circuit, sitting *en banc*, assessed the constitutionality of Kentucky State University's decision to confiscate and withhold distribution of its student yearbook because university officials determined that it was "of poor quality and 'inappropriate.'" *Id.* A divided panel of that court affirmed the district court's determination that, under *Hazelwood*, the propriety of the university officials' conduct turned on whether such conduct was "reasonable." *Id.* at 346 (citing *Hazelwood*). The full court, however, granted *en banc* review "to determine whether the panel and the district court erred in applying *Hazelwood* – a case that deals exclusively with the First Amendment rights of students in a high school setting – to the university setting." *Id.* Ultimately, the Sixth Circuit concluded that the university's conduct in confiscating the yearbook was unconstitutional because it was neither a reasonable time, place or manner regulation nor a "narrowly crafted regulation designed to preserve a compelling state interest." *Id.* at 354. In so holding, the Sixth Circuit explained:

> The parties essentially agree that *Hazelwood* applies only marginally to this case. [The students] argue that *Hazelwood* is factually inapposite to the case at hand; the KSU officials argue that the district court relied upon *Hazelwood* only for guidance in applying forum analysis to student publications. Because we find that a forum analysis requires that the yearbook be analyzed as a limited public forum – rather than a nonpublic forum – we agree with the parties that *Hazelwood* has little application to this case.

Id. at 346 n.5. Thus, the *en banc* court rejected the panel's decision that, under *Hazelwood*, the propriety of withholding the yearbook turned on whether such conduct was "reasonable." *See id.* at 347 (analyzing whether university's conduct was constitutional as either a time, place or manner regulation or a regulation narrowly crafted to serve a compelling state interest).

Similarly, in *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), a panel of the Ninth Circuit divided sharply over the application of this Court's decision in *Hazelwood* to a student's claim that the University of California at Santa Barbara ("UCSB") violated his First Amendment rights by refusing to approve his graduate thesis and file it in the school library. The district court granted summary judgment in favor of the defendants. *Id.* at 946. Announcing the panel's decision affirming that judgment, Judge Graber observed that "courts addressing the extent to which a public college or university, consistent with the First Amendment, can regulate student speech in the context of *extracurricular* activities, such as yearbooks and newspapers, have held that *Hazelwood* deference does not apply." *Id.* at 949 (citing *Kincaid*, 236 F.3d at 346 & nn. 4 & 5; *Student Gov't Ass'n*, 868 F.2d at 480 n.6). By the same token, Judge Graber

concluded that, where "core *curricular* speech" is at issue, *id.* at 950, "*Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work," *id.* at 949.[10] According university officials the deference contemplated by *Hazelwood*, Judge Graber determined that UCSB did not violate the student's First Amendment rights when it decided not to approve the thesis. *Id.*

Concurring in the affirmance, Judge Ferguson concluded that the case did not implicate the First Amendment at all because, in his view, the university sought to punish the plaintiff for his lack of academic integrity, not for the content of his speech. *Id.* at 956. Accordingly, Judge Ferguson concluded that, "[j]ust as the university could punish the plaintiff for plagiarism or cheating, so could it refuse to approve his dishonest" conduct in connection with the preparation of his thesis. *Id.*

Judge Reinhardt dissented in part, emphasizing that "there is no agreement between my colleagues in the

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[10] *Accord Bishop v. Aranov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (holding that, under *Hazelwood*, a university may attempt to control a professor's speech during classroom instruction because "educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1287 n.6, 1289 (10th Cir. 2004) (although "some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities," *Hazelwood* is nevertheless "applicable in a university setting for speech that occurs in a classroom as part of a class curriculum"). Unlike this case, *Bishop* and *Axson-Flynn* both involved actions by university officials to control the content of speech in connection with the educational curriculum. Indeed, the Tenth Circuit expressly limited its holding in *Axson-Flynn* to "speech that occurs within a classroom." 356 F.3d at 1289. The decision below, therefore, stands alone in applying *Hazelwood* to a college newspaper operated as an extracurricular activity separate and apart from the university's educational curriculum.

majority as to the legal standard applicable to [plaintiff's] First Amendment claims. Thus, there is no majority opinion and no binding precedent with respect to any First Amendment principles." *Id.* at 956-57. For his part, Judge Reinhardt would have reversed the district court's grant of summary judgment and took pains to assert that:

> I vehemently disagree with Judge Graber's conclusion that *Hazelwood* provides the appropriate First Amendment standard for college and graduate student speech and begin this section by emphasizing that her opinion on this point is hers alone and is not joined by any other judge on this panel.

Id. at 960.

Especially in the wake of this uncertainty in the lower courts, the Seventh Circuit's decision to extend *Hazelwood* to the public colleges and universities of this nation, a decision rendered in the context of a case in which the student expression at issue constituted an extracurricular activity engaged in by adult students separate and apart from the university's educational curriculum, raises an important issue of federal law that, if left unaddressed by this Court, threatens to have profound implications for freedom of expression in higher education. As this Court explained in *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589, 603 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

See also Healy, 408 U.S. at 180-81 ("[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom").

This Court's traditional dedication to preserving academic freedom has extended to all members of the academic community, students and faculty alike, and the Court's vigilance has been at its zenith in the context of public colleges and universities. As Justice Kennedy emphasized in his opinion for the Court in *Rosenberger*, 515 U.S. at 835-36:

> [T]he chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . [U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

Indeed, although a university's unique role as the quintessential marketplace of ideas makes it an ideal setting for the free exchange of competing views, that role likewise renders it particularly susceptible to efforts to suppress them. In recent years, for example, many colleges and universities

have experimented with so-called campus "speech codes" which, although ostensibly designed to combat harassment on the basis of race, sex, disability and other classifications, have often swept within their ambit a substantial amount of protected speech. *See, e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995) (university speech code that, among other things, prohibited the use of "symbols, [epithets] or slogans that infer negative connotations about an individual's racial or ethnic affiliation" void as overbroad and vague); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003) (campus speech code unconstitutionally overbroad where, *inter alia*, it directed students to "communicate their beliefs 'in a manner that does not provoke, harass, intimidate, or harm another'").[11] Similarly in recent years, several colleges and universities have undertaken to limit student protests and demonstrations to designated areas on public campuses, arguing that such "free speech zones" constitute nothing more than reasonable time, place and manner restrictions.[12]

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[11] In 2003, the Foundation for Individual Rights in Education reported that, of the 176 colleges it surveyed, 76 restricted speech that otherwise would be protected off campus. *Political correctness squelching campus speech, group says*, Associated Press, Oct. 30, 2003.

[12] *See* Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 Ind. L.J. 267, 267-68 (2004):

> In September 2000, a student at New Mexico State University was arrested after disobeying a police officer's request to stop leafleting outside the student union because it was not an "open forum area." At the University of Mississippi in the same year, a student was arrested for protesting the student newspaper outside the school's only designated speech area. In November 2001, police ejected a West Virginia University student from a Disney on-campus recruiting seminar because the student had previously handed out anti-Disney flyers outside of the designated

Absent review by this Court, the Seventh Circuit's decision in this case, which extends the deference from First Amendment scrutiny articulated in *Hazelwood* broadly to student expression at public colleges and universities, will surely accelerate the promulgation of such regulations across the nation. As Judge Reinhardt observed in his dissenting opinion in *Brown v. Li*, 308 F.3d at 962, the "suggestion that we import the *Hazelwood* standard into the college and university context is particularly unfortunate, because the standard is a deferential one that courts often use to justify highly questionable actions by high school educators that restrict controversial speech."[13] Accordingly, this Court should grant the petition and provide meaningful guidance to the lower courts as they continue to grapple with the appropriate reach of *Hazelwood* across a broad spectrum of issues at the core of our historic commitment to free expression on college campuses.

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zone. And in 2002, twelve Florida State University students were arrested for trespassing after refusing to move their protest from in front of the administration building to a less visible "demonstration zone."

[13] *See also, e.g.*, Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 Tenn. L. Rev. 481, 498-99 (2001) (citing examples of post-*Hazelwood* censorship of high school press including one school's refusal to publish an article concerning the arrest of the school superintendent for drunk driving because, the school contended, the student newspaper should not be used as a forum for criticism).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

September 16, 2005

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-4155
MARGARET L. HOSTY, JENI S. PORCHE,
and STEVEN P. BARBA,

Plaintiffs-Appellees,

v.

PATRICIA CARTER,

Defendant-Appellant,

and

GOVERNORS STATE UNIVERSITY, et al.,

Defendants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 01 C 500—**Suzanne B. Conlon,** *Judge.*

ARGUED JANUARY 7, 2003—DECIDED APRIL 10, 2003
REARGUED EN BANC JANUARY 8, 2004—DECIDED
JUNE 20, 2005

Before FLAUM, *Chief Judge*, and POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, KANNE, ROVNER, WOOD, EVANS, and WILLIAMS, *Circuit Judges*.[†]

EASTERBROOK, *Circuit Judge*. Controversy began to swirl when Jeni Porche became editor in chief of the *Innovator*, the student newspaper at Governors State University. None of the articles concerned the apostrophe missing from the University's name. Instead the students tackled meatier fare, such as its decision not to renew the teaching contract of Geoffrey de Laforcade, the paper's faculty adviser.

I

After articles bearing Margaret Hosty's by-line attacked the integrity of Roger K. Oden, Dean of the College of Arts and Sciences, the University's administration began to take intense interest in the paper. (Here, and in Part II of this opinion as well, we relate matters in the light most favorable to the plaintiffs.) Both Oden and Stuart Fagan (the University's President) issued statements accusing the *Innovator* of irresponsible and defamatory journalism. When the *Innovator* declined to accept the administration's view of its duties—in particular, the paper refused to retract factual statements that the administration deemed false, or even to print the administration's responses—Patricia Carter, Dean of Student Affairs and Services, called the *Innovator*'s printer and told it not to print any issues that she had not reviewed and approved in advance. The printer was not willing to take the risk that it would not be paid (the paper relies on student activity funds), and the editorial staff was unwilling to submit to prior review. Publication ceased in

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[†] Circuit Judge Sykes, who joined the court after the oral argument, did not participate in the consideration or decision of this case.

November 2000. The paper has since resumed publication under new management; Porche, Hosty, and Steven Barba, another of the paper's reporters, have continued the debate in court, suing the University, all of its trustees, most of its administrators, and several of its staff members for damages under 42 U.S.C. § 1983.

Defendants moved for summary judgment, and the district court granted the motion with respect to all except Dean Carter. 2001 U.S. Dist. LEXIS 18873 (N.D. Ill. Nov. 13, 2001); see also 174 F. Supp. 2d 782 (N.D. Ill. 2001). Some defendants prevailed because, in the district judge's view, they had not done anything wrong (or, indeed, anything at all, and § 1983 does not create vicarious liability); others received qualified immunity. As for Carter, however, the judge thought that the evidence could support a conclusion that threatening to withdraw the *Innovator*'s financial support violated the first amendment to the Constitution (applied to the University, as a unit of state government in Illinois, through the fourteenth). Although *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), holds that faculty may supervise and determine the content of a student newspaper, the district court thought that decision limited to papers published by high school students as part of course work and inapplicable to student newspapers edited by college students as extracurricular activities—and the judge added that these distinctions are so clearly established that no reasonable person in Carter's position could have thought herself entitled to pull the plug on the *Innovator*. Carter took an interlocutory appeal to pursue her claim of qualified immunity. See *Behrens v. Pelletier*, 516 U.S. 299 (1996). A panel of this court affirmed, 325 F.3d 945 (2003), and we granted Carter's petition for rehearing en banc.

When entertaining an interlocutory appeal by a public

official who seeks the shelter of qualified immunity, the threshold question is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). See also, e.g., *Brosseau v. Haugen*, 125 S. Ct. 596, 598 (2004); *Newsome v. McCabe*, 319 F.3d 301, 303-04 (7th Cir. 2003). Only if the answer is affirmative does the court inquire whether the official enjoys qualified immunity. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. We address the issues in the order *Saucier* specifies: the existence of a constitutional claim in Part II and immunity in Part III.

II

A

Hazelwood provides our starting point. A high school's principal blocked the student newspaper (which was financed by public funds as part of a journalism class) from publishing articles that the principal thought inappropriate for some of the school's younger students and a potential invasion of others' privacy. When evaluating the students' argument that the principal had violated their right to freedom of speech, the Court first asked whether the paper was a public forum. 484 U.S. at 267-70. After giving a negative answer based on the school's established policy of supervising the writing and reviewing the content of each issue, the Court observed that the school's subvention of the paper's costs distinguished the situation from one in which students were speaking independently, as in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). When a school regulates speech for which it also pays, the Court

held, the appropriate question is whether the "actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. "Legitimate" concerns, the Court stated, include setting "high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and [the school] may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." *Id.* at 271-72. Shortly after this passage the Court dropped a footnote: "A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 273-74 n.7 (citations omitted).

Picking up on this footnote, plaintiffs argue, and the district court held, that *Hazelwood* is inapplicable to university newspapers and that post-secondary educators therefore cannot ever insist that student newspapers be submitted for review and approval. Yet this footnote does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable. It addresses degrees of deference. Whether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age. Only when courts need assess the reasonableness of the asserted

pedagogical justification in non- public-forum situations does age come into play, and in a way suggested by the passage we have quoted from *Hazelwood*'s text. To the extent that the justification for editorial control depends on the audience's maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.) To the extent that the justification depends on other matters—not only the desire to ensure "high standards for the student speech that is disseminated under [the school's] auspices" (the Court particularly mentioned "speech that is . . . ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences", 484 U.S. at 271) but also the goal of dissociating the school from "any position other than neutrality on matters of political controversy", *id.* at 272—there is no sharp difference between high school and college papers.

The Supreme Court itself has established that age does not control the public-forum question. See generally *Symposium: Do Children Have the Same First Amendment Rights As Adults?*, 79 Chi.-Kent L. Rev. 3-313 (2004) (including many articles collecting and discussing these decisions). So much is clear not only from decisions such as *Tinker*, which held that public school students have a right of non-disruptive personal expression on school premises, but also from the decisions concerning the use of school funds and premises for religious expression. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). See also *Hedges v. Wauconda Community Unit School District*

No. 118, 9 F.3d 1295 (7th Cir. 1993). These decisions hold that no public school, of any level—primary, secondary, or post-secondary—may discriminate against religious speech in a public forum (including classrooms made available to extracurricular activities), or withhold funding that would be available to student groups espousing sectarian views. *Good News Club*, which dealt with student clubs in an elementary school, deemed dispositive (533 U.S. at 110) a decision about the first amendment rights of college students. Having opened its premises to student clubs, and thus created a limited-purpose public forum, even an elementary school could not supervise or censor the views expressed at a meeting of the Good News Club.

If private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school (the holding of *Good News Club*) then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level—or later, as *Rust v. Sullivan*, 500 U.S. 173 (1991), shows by holding that the federal government may insist that physicians use grant funds only for the kind of speech required by the granting authority. Cf. *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). We hold, therefore, that *Hazelwood*'s framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools. See also *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (*Hazelwood* supplies the framework for evaluating collegiate speech and allows regulation when the speech is connected to the curriculum); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (*Hazelwood* supplies the framework for evaluating collegiate speech and allows regulation when readers might infer the school's approval).

B

Hazelwood's first question therefore remains our principal question as well: was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a non-public forum or publish the paper itself (a closed forum where content may be supervised)? Plaintiffs contend, and the district court agreed, that the Court found a public forum missing in *Hazelwood* only because the paper was prepared as part of the journalism curriculum. By contrast, the *Innovator* was an extracurricular activity, and thus beyond all control, the district court concluded. Yet if the Constitution establishes a bright line between curricular activities and all other speech, then decisions such as *Rust* and *Finley* are inexplicable, for they hold that speakers who have completed their education still must abide by the conditions attached to public subsidies of speech and other expressive activities. See also Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151 (1996).

Suppose the University had given the *Innovator* $10,000 to publish a semester's worth of newspapers, and Porche then had decided that the students would get more benefit from a booklet describing campus life and cultural activities in the surrounding neighborhoods. Both paper and booklet are forms of speech, but the fact that the publication was not part of the University's curriculum and did not carry academic credit would not have allowed Porche to divert the money from one kind of speech to the other.

Or suppose that the publication in question were one under the University's direct management—say, its alumni magazine. If the University offered course credit to journalism students who prepared a publishable puff piece,

the right to control would be evident. The University, after all, is the alumni magazine's publisher; the contents are *its* speech; units of state and local government are entitled to speak for themselves. See *Johanns v. Livestock Marketing Ass'n*, No. 03-1164 (U.S. May 23, 2005), slip. op. 6-8; *University of Wisconsin v. Southworth*, 529 U.S. 217, 229 (2000); *Keller v. State Bar*, 496 U.S. 1, 12-13 (1990). That institutions can speak only through agents does not allow the agents to assume control and insist that submissions graded D-minus appear under the University's masthead. *Livestock Marketing Ass'n* has dispelled all doubt on that score.

Now take away the course credit and assume that the alumni magazine hires students as stringers and pays by the word for any articles accepted and printed. The University would remain the operator of this non-public forum and could pick and choose from among the submissions, printing only those that best expressed the University's own viewpoint. Thus although, as in *Hazelwood*, being part of the curriculum may be a *sufficient* condition of a non-public forum, it is not a *necessary* condition. Extracurricular activities may be outside any public forum, as our alumni-magazine example demonstrates, without also falling outside all university governance. Let us not forget that academic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts. See *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990); *University of Michigan v. Ewing*, 474 U.S. 214 (1985); *Southworth*, 529 U.S. at 237-39 (Souter, J., concurring).

What, then, was the status of the *Innovator?* Did the University establish a public forum? Or did it hedge the funding with controls that left the University itself as the newspaper's publisher? If the paper operated in a public forum, the University could not vet its contents. See *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). But if underwritten student publications at Governors State University are a non-public forum, then it becomes important whether Dean Carter had legitimate pedagogical reasons for her action. We do not think it possible on this record to determine what kind of forum the University established or evaluate Dean Carter's justifications. But the question posed by *Saucier* is not who wins in the end, but whether the evidence makes out a constitutional claim when taken in the light most favorable to the plaintiff. These facts would permit a reasonable trier of fact to conclude that the *Innovator* operated in a public forum and thus was beyond the control of the University's administration.

The *Innovator* did not participate in a traditional public forum. Freedom of speech does not imply that someone else must pay. The University does not hand out money to everyone who asks. But by establishing a subsidized student newspaper the University may have created a venue that goes by the name "designated public forum" or "limited-purpose public forum". See *United States v. American Library Association,* 534 U.S. 194 (2003); *United States v. Kokinda,* 497 U.S. 720 (1990); *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983). Participants in such a forum, declared open to speech *ex ante,* may not be censored *ex post* when the sponsor decides that particular speech is unwelcome. The classrooms used for meetings in *Good News Club* were designated public forums,

and because the school allowed any student group to use the space the Court held that it could not forbid religious speech. In the same way, a school may declare the pages of the student newspaper open for expression and thus disable itself from engaging in viewpoint or content discrimination while the terms on which the forum operates remain unaltered. Dean Carter did not purport to alter the terms on which the *Innovator* operated: that authority belonged to the Student Communications Media Board. And the rules laid down by the Board, though ambiguous, could be thought (when considered as favorably to plaintiffs as the record allows) to create a designated public forum.

Defendants concede that the Board is the publisher of the *Innovator* and other subsidized print and broadcast media. The Board has seven members, all chosen by the Student Senate: four students, two faculty members, and one "civil service or support unit employee of the university." The Board determines how many publications it will underwrite (subject to the availability of funds, which as in *Southworth* and *Rosenberger* come from student activities fees), and the general character of each. It appoints "for the period of one year, the head of each student media staff." The Board's policy is that each funded publication "will determine content and format . . . without censorship or advance approval". If this is all there is to it, then the *Innovator* is in the same position as the student speakers in *Southworth* and *Rosenberger*: a designated public forum has been established, and the faculty cannot censor speech within it. When viewing matters in the light most favorable to the students, we stop here, because other matters are cloudy.

Two things have the potential to cast matters in a different light if a trial were to occur. One is that the Board's charter provides that it is "responsible to the Director of Student

Life." Perhaps the Director of Student Life (who appears to be one of Dean Carter's subordinates) has established criteria for subsidized student publications. None is in the record, however, so this possibility does not matter. The other is that each funded publication has a faculty adviser. The parties disagree not only about who the adviser was at the critical time (plaintiffs say that de Laforcade remained their adviser even after he left the University's faculty; Carter insists that a different person filled that position) but also about whether the adviser just offers advice (plaintiffs' view) or exercises some control (Carter's view). Because the district court acted on a motion for summary judgment, it assumed (as do we) that plaintiffs' perspective is the correct one. On that understanding, the Board established the *Innovator* in a designated public forum, where the editors were empowered to make their own decisions, wise or foolish, without fear that the administration would stop the presses.

III

Qualified immunity nonetheless protects Dean Carter from personal liability unless it should have been "clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition". *Id.* at 201. See also, e.g., *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Greenberg v. Kmetko*, 840 F.2d 467 (7th Cir. 1988) (en banc). One might well say as a "broad general proposition" something like "public officials may not censor speech in a designated public forum," but whether Dean Carter was bound to know that the *Innovator* operated in such a forum is a different question altogether.

The district court held that any reasonable college administrator should have known that (a) the approach of *Hazelwood* does not apply to colleges; and (b) only speech that is part of the curriculum is subject to supervision. We have held that neither of these propositions is correct—that *Hazelwood*'s framework is generally applicable and depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities.

But even if student newspapers at high schools and colleges operate under different constitutional frameworks, as both the district judge and our panel thought, it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule. The question had been reserved in *Hazelwood,* and the Supreme Court does not identify for future decision questions that already have "clearly established" answers. See *Wilson v. Layne,* 526 U.S. 603, 614-18 (1999). Post-*Hazelwood* decisions likewise had not "clearly established" that college administrators must keep hands off all student newspapers. As we mentioned in Part II.A, the tenth and eleventh circuits have used *Hazelwood* as the framework for evaluating the acts of colleges as well as high schools. One circuit has said otherwise. See *Student Government Ass'n v. University of Massachusetts,* 868 F.2d 473, 480 n.6 (1st Cir. 1989) (asserting, in sole reliance on *Hazelwood*'s footnote 7, that the Supreme Court itself "holds" that *Hazelwood*'s approach does not apply to post-secondary education). The approach of others is hard to classify. See *Kincaid v. Gibson,* 236 F.3d 342, 346 n. 5 (6th Cir. 2001) (en banc) (stating, in reliance on the parties' agreement, that *Hazelwood* has "little application" to collegiate publications but not explaining what this means, or how a constitutional framework can apply "just a little"). This circuit had not spoken on the

subject until our panel's opinion, which post-dated Dean Carter's actions.

Many aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply, as we remarked in *Baxter v. Vigo County School Corp.*, 26 F.3d 728 (7th Cir. 1994), when holding school administrators entitled to qualified immunity for banning certain message-bearing T-shirts that the elementary-school pupils claimed were protected under *Tinker*. See also, e.g., *Brown v. Li*, 308 F.3d 939 (9th Cir. 2003), in which the members of the appellate panel articulated three distinct and incompatible views about whether *Hazelwood* applies to collegiate settings and how the first amendment affects relations between college faculty and students' expression.

Neither plaintiffs, who have elected to appear *pro se*, nor the *amici curiae* who have ably supported their position in this court, contend that Dean Carter owes damages from her own purse if *Hazelwood* establishes the appropriate legal framework. For reasons that should by now be evident, the implementation of *Hazelwood* means that both legal and factual uncertainties dog the litigation—and it is the function of qualified immunity to ensure that such uncertainties are resolved by prospective relief rather than by financial exactions from public employees. "Qualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau*, 125 S. Ct. at 599. That description is as apt here as it was in *Brosseau*.

Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved. Disputes about both law and fact make it inappropriate to say that any

reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator*'s printing bills violated the first amendment. She therefore is entitled to qualified immunity from liability in damages.

REVERSED.

EVANS, *Circuit Judge*, joined by ROVNER, WOOD, and WILLIAMS, *Circuit Judges*, dissenting. In concluding that *Hazelwood* extends to a university setting, the majority applies limitations on speech that the Supreme Court created for use in the *narrow* circumstances of elementary and secondary education. Because these restrictions on free speech rights have no place in the world of college and graduate school, I respectfully dissent.

The majority's conclusion flows from an incorrect premise—that there is no legal distinction between college and high school students. In reality, however, "[t]he Court long has recognized that the status of minors under the law is unique in many respects." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). Age, for which grade level is a very good indicator,[1] has always defined legal rights. As the Court has noted:

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are

[1] According to the U.S. Census Bureau, only about one percent of those enrolled in American colleges and universities in 2002 were under the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey (CPS) Rep., Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002."

> protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.

Planned Parenthood of Missouri. v. Danforth, 428 U.S. 52, 74 (1976) (internal citations omitted).

This principle is clear with respect to free speech rights, where the Court has delineated a consistent line between high-school-age students and those at the university level. As the Court noted in *Board of Regents of the University of Wisconsin System v. Southworth,* 529 U.S. 217, 238 n.4 (2000), "the right of teaching institutions to limit expressive freedom of students ha[s] been confined to high schools whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." (Internal citations omitted.) *See also Healy v. James,* 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.").

There are two reasons why the law treats high school students differently than it treats college students, who "are, of course, young adults," *Widmar v. Vincent,* 454 U.S. 263, 274 n.14 (1981): high school students are less mature and the missions of the respective institutions are different. These differences make it clear that *Hazelwood* does not apply beyond high school contact.

It is self-evident that, as a general matter, juveniles are less mature than adults. Indeed, "during the formative years of

childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635. *See also Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (footnote omitted) ("[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."). It is this reasoning that dictated the results in *Hazelwood* and *Bethel School District No. 403 v. Fraser*. In *Hazelwood*, the Court emphasized that a different First Amendment standard is appropriate in a high school setting because those students are young, emotionally immature, and more likely to be inappropriately influenced by school-sponsored speech on controversial topics. *Hazelwood*, 484 U.S. at 272. It was, therefore, reasonable to restrict publication of an article about teenage pregnancy. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), where the Court permitted a high school to sanction a student for making a lewd student council election speech, makes a similar point. The Court emphasized that "[t]he speech could well be seriously damaging to its *less mature* audience. . . ." *Id.* at 683-84 (emphasis added).[2] The same concerns simply do not apply to college students, who are certainly (as a general matter) more mature, independent thinkers. *Tilton v. Richardson*, 403 U.S. 672, 686 (1971), establishes this point. The Court upheld a federal law that provided funding to church-related colleges and universities for construction of facilities for secular educational purposes.

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[2] Other decisions of the Court outside the free speech arena likewise emphasize that greater restrictions are permitted on the rights of juveniles because they are less mature. For example, in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court noted that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592.

The Court noted that pre-college students may not have the maturity to make their own decisions on religion; however, "college students are less impressionable and less susceptible to religious indoctrinations."

Not only is there a distinction between college and high school students themselves, the missions of the two institutions are quite different. Elementary and secondary schools have "custodial and tutelary responsibility for children," *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829-30 (2002) (holding that "Fourth Amendment rights . . . are different in public schools than elsewhere"), and are largely concerned with the "inculcation" of "values." *Fraser*, 478 U.S. at 683; *see also Ambach v. Norwick*, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions[.]"). A university has a different purpose—to expose students to a "marketplace of ideas." *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (emphasizing that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . ."). *See also Bd. of Regents v. Southworth*, 529 U.S. 217, 231 (2000) ("[R]ecognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) (noting that intellectual curiosity of students remains today a central determination of a university's success and asserting that restriction of that curiosity "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (noting that an atmosphere of " 'speculation,

experiment and creation'" is "essential to the quality of higher education" (quoting *Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring))); *Widmar,* 454 U.S. at 267-68 n.5 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.' ").

As the Supreme Court perhaps best articulated in *Healy v. James:*

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The college classroom with its surrounding environs is peculiarly the "'marketplace of ideas,'" and we break no new constitutional ground in affirming this Nation's dedication to safeguarding academic freedom.

408 U.S. 169, 180-81 (1972) (quoting *Shelton v. Tucker,* 364 U.S. 479, 487 (1960), and *Keyishian,* 385 U.S. at 603). Based on this important notion, I do not believe it is appropriate for this court to extend *Hazelwood* to the college and university setting.

The majority's holding, furthermore, is particularly unfortunate considering the manner in which *Hazelwood* has been used in the high school setting to restrict controversial speech. *See, e.g., Planned Parenthood v. Clark County Sch. Dist.,* 941 F.2d 817 (9th Cir. 1991) (holding that the school district's justification for refusing to publish family planning advertisements in high school newspapers was reasonable

under the *Hazelwood* standard); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994) (upholding the decision of an elementary school principal who prohibited a student from wearing shirts with messages such as "Unfair Grades" and "Racism"); *Poling v. Murphy*, 872 F.2d 757, 764 (6th Cir. 1989) (upholding the decision of a high school administration to exclude a student from a student council race because he made a rude comment about the assistant principal in a speech delivered at a school assembly).

If the plaintiffs' allegations are true, this case epitomizes this concern. The *Innovator*, as opposed to writing merely about football games, actually chose to publish hard-hitting stories. And these articles were critical of the school administration. In response, rather than applauding the young journalists, the University decided to prohibit publication unless a school official reviewed the paper's content before it was printed. Few restrictions on speech seem to run more afoul of basic First Amendment values. First, prior restraints are particularly noxious under the Constitution. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's free press] guaranty to prevent previous restraints upon publication"). Second, and even more fundamental, as Justice Frankfurter stated (albeit in somewhat dated language) in *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944), "one of the prerogatives of American citizenship is the right to criticize public men and measures." College students—voting-age citizens and potential future leaders—should feel free to question, challenge, and criticize government action. Nevertheless, as a result of today's

holding, Dean Carter could have censored the *Innovator* by merely establishing "legitimate pedagogical reasons." This court now gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment.

Finally, I disagree with the majority's conclusion that Dean Carter is entitled to qualified immunity. Prior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers. *See, e.g., Stanley v. Magrath*, 719 F. 2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *adopted en banc in* 489 F.2d 225 (5th Cir. 1973); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Dickey v. Alabama St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy St. Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S. 2d 333 (N.Y. 1973); *Mazart v. State*, 109 Misc.2d 1092, 441 N.Y.S. 2d 600 (N.Y. Ct. Cl. 1981); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983).

Hazelwood did not change this well-established rule. So, the question becomes, did anything after *Hazelwood* occur that would suggest to a reasonable person in Dean Carter's position that she could prohibit publication simply because she did not like the articles it was publishing?[3] The answer is

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[3] Considering that the law was clearly established that college administrators could not control school newspapers, the majority wrongly focuses on the fact that post-*Hazelwood* decisions had not "clearly established that college administrators must keep hands off all student newspapers." The question is not whether later decisions established that

clearly "no." In fact, a review of the cases, including those the majority relies on, establishes that no case law would have led any reasonable official in Dean Carter's position to believe she had such power.

To begin, both the First Circuit (explicitly) and Sixth Circuit (implicitly) are of the view that *Hazelwood* does not apply in the university setting. In *Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F.2d 473, 480 n.6 (1st Cir. 1989), the First Circuit held that *Hazelwood* "is not applicable to college newspapers." In *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc), a dispute involving a college yearbook, the court determined that *Hazelwood* had "little application" to the case. *Id.* at 346 n.5. In so noting, the court ruled that the university's yearbook constituted a limited public forum in which content-based regulations were subject to strict scrutiny. The court then held that the administration's decision to confiscate the yearbook, due to unhappiness over its content, violated the First Amendment.

The decisions the majority cites in support of its position, moreover, are inapplicable. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), and *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), both concerned free speech rights *within* the classroom. *Bishop* held that a university could order a professor to stop interjecting his personal religious beliefs into his class comments during instruction time. *Axson-Flynn* held that an acting student at a university could be required to say script lines that conflict with her Mormon faith as part of the curriculum. These are very different

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college administrators "must keep hands off," but rather whether later decisions did anything to change the already clearly established rule. In other words, did decisions after *Hazelwood* say anything to suggest that college administrators *could* censor school newspapers.

situations than free speech rights of student journalists engaged in an extracurricular activity. Indeed, the Tenth Circuit recognized such a distinction and explicitly limited its holding: "We hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum." *Id.* at 1289. It specifically noted, "We acknowledge that some circuits have cast doubt on the application of *Hazelwood* in the context of university *extracurricular* activities. However, because Axson-Flynn's speech occurred as part of a *curricular* assignment during class time and in the classroom, we need not reach any analysis of university's students' extracurricular speech." *Id.* at 1286 n.6 (emphasis added) (internal citations omitted). Finally, I am hard-pressed to see the relevance of *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995). That case concerned a ninth grader who challenged her teacher's decision not to accept a research paper because it was on an unapproved topic. Regardless, *Kincaid*, not *Settle*, constitutes the Sixth Circuit's definitive word on the issue.[4]

Therefore, considering that no court, both before or after *Hazelwood*, has held that a university may censor a student newspaper, and the only authorities to suggest otherwise are not directly on point, I believe that it was "clearly

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[4] The majority wisely does not, as Dean Carter does, rely on the Ninth Circuit's decision in *Brown v. Li*, 308 F.3d 939 (2002), *cert. denied*, 538 U.S. 908 (2003), and the decision of a panel of the Sixth Circuit in *Kincaid*, 191 F.3d 719 (1999). With respect to *Brown*, only one judge on the panel, Judge Graber, approved of the application of *Hazelwood*. Judge Graber, moreover, applied *Hazelwood* only in the context of a student's masters thesis included in the school's curriculum. *Brown*, 308 F.3d at 949. Again, a very different situation than the one presented here. As for *Kincaid*, that panel decision had already been vacated by the full circuit when Dean Carter restrained publication of the *Innovator*. *See* 197 F.3d at 828 (6th Cir. 1999) (vacating panel decision).

established" that the University could not deny funding to the school newspaper it found objectionable.

The majority also states that Dean Carter is entitled to qualified immunity because "A reasonable person in Dean Carter's position was not bound to recognize that the *Innovator* operated in a designated public forum." Although an objective standard, I believe it is noteworthy that, as the district court noted, "Defendants concede that the Innovator serves as a public forum." 174 F. Supp. 2d 782, 786 (N.D. Ill. 2001). A review of the facts, accepting all well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff, support Dean Carter's litigation strategy below. Governors State University, by express policy and practice, placed exclusive editorial control of the newspaper with the student editors. Indeed, its own policy stated that the student staff "will determine content and format of their respective publications without censorship or advance approval." The *Innovator* is an independent publication organized and published by students on their own time. The publication is not part of an academic program, but rather an extracurricular activity. The students are provided an advisor, but it is not a class taught by a faculty member, and the advisor did not make any content decisions, only advice was offered. Considering these facts, a reasonable person in Dean Carter's shoes would have believed the *Innovator* operated as a public forum.

In conclusion, because I believe that *Hazelwood* does not apply, no pedagogical concerns can justify suppressing the student speech here. Dean Carter violated clearly established First Amendment law in censoring the student newspaper. I would affirm the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-4155
MARGARET HOSTY, JENI PORCHE, and
STEVEN P. BARBA, individually and d/b/a INNOVATOR,

Plaintiffs-Appellees,

v.

PATRICIA CARTER,

Defendant-Appellant,

and

GOVERNORS STATE UNIVERSITY; BOARD OF TRUSTEES OF GOVERNORS STATE UNIVERSITY; DONALD BELL; TOMMY DASCENZO; STUART FAGAN; PAUL KEYS; JANE WELLS; DEBRA CONWAY; PEGGY WOODARD; FRANCIS BRADLEY; PETER GUNTHER; ED KAMMER; DOROTHY FERGUSON; JUDY YOUNG; CLAUDE HILL IV; and PAUL SCHWELLENBACH,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 500—**Suzanne B. Conlon,** *Judge.*

ARGUED JANUARY 7, 2003—DECIDED APRIL 10, 2003

Before COFFEY, ROVNER, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. Fifteen years ago, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Supreme Court held that high school administrators have broad powers to censor school-sponsored newspapers if their actions are supported by valid educational purposes. In this case, involving an appeal from an order denying summary judgment on qualified immunity grounds, we are asked to consider whether the principles of *Hazelwood* apply to public college and university students.

The three plaintiffs in this case—Porche, Hosty, and Baron[5]—are (or, when this case began, were) students at Governors State University, a state-run institution in University Park, Illinois. They were appointed by the school's "Student Communications Media Board" (SCMB) to serve as editor-in-chief, managing editor, and staff reporter for its newspaper, the *Innovator*, which is supported by student activity fees. According to the plaintiffs, whose claims we must credit at this stage of the proceedings, they occasionally published articles and letters to the editor that were critical of certain faculty members and the school's administration.

When our three plaintiffs took their positions at the *Innovator* and during all times relevant to this lawsuit, the policy of the SCMB was that the student staff of the *Innovator* "will determine content and format of their respective publications *without censorship or advance approval*." (Emphasis added.) Although the newspaper's

[5] The district court and the Illinois attorney general use "Barba." We use "Baron," the name the plaintiffs-appellees use.

faculty adviser often read stories intended for publication at the request of the student editors, the adviser did not make content decisions. Only advice was offered.

In the fall of 2000, Patricia Carter, the university's dean of Student Affairs and Services, twice called Charles Richards, president of Regional Publishing, the company which held the contract for printing the *Innovator*. In those calls, Dean Carter told Richards that a school official must review the *Innovator*'s content before it could be printed. She instructed Richards to call her when he received future issues of the paper.

In a November 14, 2000, memo delivered to the *Innovator* editors, Richards relayed the substance of his conversations with Dean Carter. He said Dean Carter told him his company was not to publish any more issues of the *Innovator* without prior approval by a university official. He noted, however, that his understanding of the law was that prior approval by school officials was not cricket. However, he also observed that he was "no attorney, so that the final decision of the handling of this matter should not be left to me." The student editors understood Richards' comments to mean that his company would not print additional editions of the paper until the issue of Dean Carter's prior approval requirement was settled. A company representative confirmed that it did not want to risk printing the newspaper and then not get paid for the effort.

Sparks were ready to fly. The student editors filed this suit against 17 defendants, listing a litany of grievances in their complaint. Ultimately, all defendants were dismissed (mostly due to Eleventh Amendment problems) from the suit. All, that is, except Dean Carter, who unsuccessfully tried to escape on a claim of qualified immunity. She is here today

on a narrow interlocutory appeal from the district court's order denying her request to exit the suit before any further proceedings are required.

The pivotal issue for us is whether Dean Carter was entitled to qualified immunity. Her claim is that the law was not clearly established that her request to review and approve the *Innovator* prior to printing might violate the student editors' rights under the First Amendment.

Qualified immunity protects government officials performing discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). For several decades, courts have consistently held that student media at public colleges and universities are entitled to strong First Amendment protections. These courts have held that school administrators can only censor student media if they show that the speech in question is legally unprotected or if they can demonstrate that some significant and imminent physical disruption of the campus will result from the publication's content. Attempts by school officials, like Dean Carter here, to censor or control constitutionally protected expression in student-edited media have consistently been viewed as suspect under the First Amendment. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (university officials constitutionally prohibited from denying funding to student religious magazine based on content); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc) (confiscation of college student yearbook by administrators unhappy with content violates First Amendment). The prohibition on administrative censorship has extended to cases where school officials required mandatory prior review of student media, *Antonelli v. Hammond*, 308 F. Supp. 1329

(D. Mass. 1970); *Mazart v. State*, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983); *Trujillo v. Love*, 322 F. Supp. 1266 (D. Colo. 1971), and other indirect forms of censorship, when undertaken to affect content. *See, e.g., Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983) (striking down university's attempt to restructure funding to student newspaper because of controversial issue); *Dickey v. Alabama St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy St. Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968) (suspension of student newspaper editor for content related reasons held unconstitutional); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975) (reinstating student editors who had been removed because of administrators' objections to poor grammar, spelling, and syntax).

As one federal court of appeals noted in 1973:

> Censorship of constitutionally protected expression cannot be imposed by suspending the editors, suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorial oversight based on the institution's power of the purse.

Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973).

The court of appeals for the Fifth Circuit, sitting *en banc*, expressed similar sentiments in ruling that University of Mississippi officials acted illegally when they prohibited the publication of a school-sponsored student literary magazine because it contained "earthy language":

> The University here is clearly an arm of the state and

> this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned. It seems a well-established rule that once a University recognizes a student activity which has elements of free expression, it can act to censor that expression only if it acts consistent with First Amendment constitutional guarantees.

Bazaar v. Fortune, 476 F.2d 570, 574 (5th Cir. 1973), *adopted en banc in* 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 1995 (1974).

Dean Carter's contention that she could not reasonably have known that it was illegal to order the *Innovator*'s printer to halt further publication of the newspaper or to require prior approval of the newspaper's content defies existing, well-established law. Because her actions, if true, violated clear constitutional rights of which she should have been aware, the district court was correct to decline her request to exit the suit via qualified immunity, if *Hazelwood* has not muddled the landscape to such an extent that the law has become unclear.

In *Hazelwood*, the Supreme Court determined that "the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266 (internal citations and quotation marks omitted). But *Hazelwood*'s rationale for limiting the First Amendment rights of high school journalism students is not a good fit for students at colleges or universities. The differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities. The

missions of each are distinct reflecting the unique needs of students of differing ages and maturity levels.

According to U.S. Census Bureau statistics, provided to us in a superb *amicus* brief filed by attorney Richard M. Goehler on behalf of a bevy of student press associations, only 1 percent of those enrolled in American colleges or universities are under the age of 18, and 55 percent are 22 years of age or older. Treating these students like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* would be an extreme step for us to take absent more direction from the Supreme Court.

The Supreme Court's restrictive First Amendment standard in *Hazelwood* sprang from its premise that the special circumstances of a secondary school environment permit school authorities to exercise greater control over expression by students than the First Amendment would otherwise permit. However, the judicial deference the Supreme Court found necessary in the high school setting—and in the factual context of *Hazelwood*—is inappropriate for a university setting. This difference was acknowledged by the Court when it explicitly reserved the question of whether the same level of deference it expressed would be "appropriate with respect to school-sponsored expressive activities at the college and university level." *Hazelwood*, at 273 n.7.

The Supreme Court has recognized that where the "vital" principles of the First Amendment are at stake, "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression."

Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 835 (1995). These dangers are especially threatening in the university setting, where the creative power of student intellectual life remains "a vital measure of a school's influence and attainment." *Id.* at 836.

While *Hazelwood* teaches that younger students in a high school setting must endure First Amendment restrictions, we see nothing in that case that should be interpreted to change the general view favoring broad First Amendment rights for students at the university level. And so we conclude that Dean Carter does not enjoy qualified immunity in this suit.

Unrelated, at least directly, to the qualified immunity issue are a few minor matters we can quickly dispatch. First, Dean Carter says the plaintiffs should have submitted copies of potential newspaper articles to the district court because the court must know what "speech" falls within the First Amendment. She contends that not doing so is a "complete failure of proof" entitling her to summary judgment. While copies of the articles that might have been published in future issues of the *Innovator* are not in the record, there is a copy of the October 31, 2000, paper. Dean Carter makes no argument that this issue of the paper lacked constitutional protection, and there is nothing in the record indicating that future copies of the *Innovator* would have differed.

Dean Carter also contends that no constitutional violation occurred because she did not actually restrict publication of the paper. She says that the plaintiffs themselves decided not to send further issues of the *Innovator* to Regional Publishing and that they did not publish an issue in December even after an administrator gave them permission to do so. Affidavits, however, show that Regional Publishing was unlikely to print another copy of the paper after Dean Carter's phone call

because of her reference to the university's control of the *Innovator*'s purse strings. Furthermore, interpreting the evidence in the light most favorable to the plaintiffs, there would have been no point in publishing a December issue of the *Innovator* after the staff received permission to do so because students were already out of town on winter break. Dean Carter's call, viewed in the light most favorable to the students, caused both Richards' apprehension in publishing another paper and the delay that made publishing a second one futile.

For these reasons, we AFFIRM the order of the district court denying Dean Carter's summary judgment motion on qualified immunity grounds, and we return the case to that court for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARGARET HOSTY, et al.,	)	
Plaintiffs,	)	
	)	No. 01 C 0500
v.	)	
	)	Suzanne B. Conlon,
	)	Judge
GOVERNORS STATE UNIVERSITY, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Margaret Hosty, Jeni Porche and Steven Barba, individually and doing business as Innovator (collectively "plaintiffs"), sue officers of Governors State University ("GSU") for prior restraint violations of the First Amendment (Count I), equitable relief (Count II) and punitive damages (Count III), pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2202. Defendants move for summary judgment.

BACKGROUND

I. The Facts

A. The Parties

All facts are undisputed unless otherwise noted. GSU is a state-run institution in University Park, Illinois. Plaintiffs are GSU students and former editors and writers of GSU's student newspaper, the Innovator. The Innovator is funded through student activities fees. Defendant Donald Bell is a GSU program director and was the administrative liaison to the Student Communications Media Board ("the media board"), which regulates and appropriates the Innovator's budget. Defendant Tommy Dascenzo was a GSU program director. Defendant Patricia Carter is Dean of Student Affairs. Defendant Stuart Fagan is President of GSU. Defendant Paul Keys is GSU's Provost and Vice President of Academic Affairs. Defendant Jane Wells is a GSU faculty member. Defendant Debra Conway is a GSU secretary. Defendant Peggy Woodard is the interim Associate Provost. Defendants Frances Bradley, Peter Gunther, Ed Kammer, Dorothy Ferguson, Claude Hill and Judy Young are members of the media board. Defendant Paul Schwellenbach supervises GSU's mailroom.

B. The Claims

Plaintiffs began working for the Innovator in May 2000. The newspaper has a faculty advisor that advises the editors and writers on issues of journalistic standards and ethics. But the student editors and writers are given complete editorial control over the newspaper, including its subject matter and content. The faculty advisor normally signs-off on the

newspaper before it is sent to the printer. GSU entered into a contract with Regional Publishing Company to print the Innovator on a bimonthly basis. However, the newspaper rarely printed that frequently during plaintiffs' tenure.

In May 2000, the Innovator's office equipment and computers were in disrepair. During the summer of 2000, the Innovator received new equipment, which included two digital scanners and three new computers. One of the newspaper's computers needed repairs but the media board would not authorize payment. Plaintiffs contend Donald Bell removed one of the Innovator's computers that contained the newspaper's files without their permission. Hosty dep. at p. 128; Porche dep. at pp. 146-47. Bell removed and replaced the computer because plaintiffs had complained the computer was non-functioning. Bell returned the computer after plaintiffs complained about its removal.

Plaintiffs contend they were denied access to computer software and manuals. Hosty dep. at pp. 133-35. Bell was the administrator responsible for computer software. Because software purchased by the media board had disappeared, Bell stored computer software in his office available upon request. Plaintiffs attest Bell was rarely in his office when they needed the software. Hosty aff. ¶ 24; Porche aff. ¶ 24. Plaintiffs also contend Bell, Dascenzo and the media board inhibited the newspaper's operations by replacing the newspaper's IBM computers with Macintosh ones. Hosty dep. at pp. 137-39. The media board replaced the IBM computers with Macintosh computers in order to conform to the media industry standard. Plaintiffs disagreed with the media board's assessment.

Prior to October 31, 2000, plaintiffs contend they were investigating a story regarding misappropriation of GSU

funds and illegal hiring practices. Hosty dep. at pp. 44-46. Plaintiffs contend their investigations were inhibited because the Innovator did not have a private facsimile machine or mailbox. Thus, they contend sources were reluctant to provide the newspaper with tips knowing their correspondence was not private. Hosty dep. at pp. 84-85. Plaintiffs also contend persons with keys to the Innovator's office, such as Bell and Dean Carter, could have seen the projected articles and tips on the newspaper's bulletin board. Hosty dep. at pp. 62-63.

In late October and early November of 2000, Dean Carter placed two phone calls to Charles Richards, Regional Publishing's owner and president, regarding the printing of the Innovator. Richards attests Dean Carter called on behalf of the GSU administration and ordered Regional Publishing not to print the Innovator without prior approval of the newspaper's content by a GSU administrator. Richards attests he informed Dean Carter that requiring prior approval was probably unconstitutional; Carter responded that Richards must call her personally before printing the next issue of the newspaper and reminded him that GSU paid Regional Publishing. Richards aff. ¶¶ 4-6, 8. Richards recorded the nature of his conversations with Dean Carter in a letter and sent a copy to plaintiffs. *Id.* at ¶ 10-11. Dean Carter denies she demanded prior approval and contends she instructed Richards to call her regarding the newspaper so that a faculty member could review the paper for journalistic quality, *e.g.*, grammatical mistakes. She contends this was necessary because the newspaper's faculty advisor was at a new post four hours from campus and was not readily available to assist the Innovator staff. Carter dep. at pp. 12-15.

After being informed of the conversations with Regional Publishing, President Fagan had Vice President Keys question Dean Carter about the phone calls and Richards' letter. Dean Carter informed Keys that Richards' characterization of the phone calls was inaccurate and that she did not instruct Regional Publishing to "halt the presses." Vice President Keys did not contact Richards or the plaintiffs about the phone calls. Vice President Keys believed Richards' letter was inaccurate and reported his conversations with Dean Carter to President Fagan. During this same time period, plaintiffs distributed a letter to the GSU community regarding Dean Carter's phone calls to Regional Publishing and reported the matter to the Illinois College Press Association.

Prior to Dean Carter's phone calls, the October 31, 2000 issue of the Innovator had already been printed and delivered. Plaintiffs continued to work on the newspaper after the October 31 issue, but contend they did not submit any further issues to Regional Publishing because of its hesitation to print the newspaper after Dean Carter's phone calls. Specifically, Regional Publishing did not want to risk printing the newspaper and not being paid by GSU. Beedie (Regional Publishing manager) aff. ¶¶ 4-5; Hosty dep. at pp. 22, 34-37; Porche dep. at pp. 33-34.

The media board approves the budget and expenditures for the Innovator and other student media. The November and December 2000 media board meetings were canceled. The November meeting was canceled so the new administrative liaison to the media board, Donald Bell, could familiarize himself with the issues pending before the media board. Bell was appointed administrative liaison one week before the scheduled November meeting. The December meeting was canceled due to the hospitalization of media board

chairman Ed Kammer. Plaintiffs contend the cancellations prevented them from publishing the newspaper because the media board controlled the essential funds. Hosty dep. at p. 16. Bell and media board members Bradley, Gunther, Kammer and Young all attest the cancellations were reasonable and did not inhibit the newspaper's progress because the Innovator's budget was already in place. Bell dep. at pp. 52-53, 112-13; Bradley aff. at ¶ 6; Gunther aff. ¶¶ 6-7; Kammer aff. ¶¶ 6-9; Young aff. ¶ 6. Moreover, in a letter announcing cancellation of the December meeting, Bell stated he would authorize printing of the newspaper if the editors had an issue ready for publication. Plaintiffs contend there was no point in printing a December edition of the newspaper because the students had left for winter break. Hosty dep. at pp. 113-14. Plaintiffs Hosty and Porche also attest the media board held a meeting regarding their tenure as editors in February 2001. They attest Bell placed a GSU policeman outside the meeting room to prevent them from entering. Porche aff. ¶ 20; Hosty aff. ¶ 20.

In the summer of 2000, plaintiffs reported break-ins to the Innovator's office to Bell, Dascenzo and the media board. Plaintiffs contend Bell informed them he would file reports with GSU police and have the Innovator's locks changed. Hosty dep. at pp. 116-17. Plaintiffs attest after Bell failed to act, they reported the break-ins to GSU police and their faculty advisor, who had the locks changed. *Id.*; Porche aff. ¶ 18; Hosty aff. ¶ 18. Bell and Dascenzo attest that when plaintiffs informed them of the break-ins, they advised plaintiffs to refer the matter to GSU police. Bell dep. at pp. 74-76; Dascenzo aff. ¶ 8. Bell and Dascenzo had keys to the newspaper's office, but they did not distribute the keys to any unauthorized individuals.

In October 2000, GSU police changed the newspaper's locks for a second time. As a result, plaintiffs were required to contact GSU police to gain access to the office for five weeks. Plaintiffs attest defendants Carter, Conway, Bell, Kammer and Wells knew the locks had been changed. Porche aff. ¶ 19, Hosty aff. ¶ 19. Plaintiffs contend the delay in gaining access to the newspaper's office disrupted the Innovator's press schedule. Porche aff. ¶ 21; Hosty aff. ¶ 21.

Plaintiffs claim the phone lines to the Innovator's office were disconnected for approximately two hours on October 25, 2000, but present no evidence of defendants' involvement. Porche dep. at p. 76. Plaintiffs also contend Innovator email messages were tampered with and deleted, but fail to present evidence of defendants' involvement. *Id.* at pp. 98-105. Plaintiffs claim Debra Conway destroyed Innovator advertisement forms and failed to process Innovator purchase orders. Porche dep. at pp. 121, 123, 126; Hosty dep. at p. 124. Conway denies ever destroying or failing to process Innovator materials. Conway aff. ¶¶ 12-20. Finally, plaintiffs contend Paul Schwellenbach tampered with Innovator mail. Hosty dep. at p. 128; Porche dep. at pp. 131, 136-37. Schwellenbach denies tampering with Innovator mail. He admits returning mail to Jeni Porche because he thought it was personal mail and GSU does not provide postage for private correspondence. Schwellenbach aff. ¶¶ 13-15.

DISCUSSION

I. Standard of Review

Summary judgment is appropriate when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *King v. Nat'l Human Res. Comm., Inc.*, 218 F.3d 719, 723 (7th Cir. 2000). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transp. Co.*, 212 F.3d 969, 972 (7th Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000).

II. Section 1983 Liability

In § 1983 actions, an individual cannot be held liable unless he caused or participated in the asserted constitutional violation. *Zimmerman v. Tribble*, 226 F.3d 568, 574 (7th Cir. 2000). Defendants argue that other than Dean Carter, plaintiffs fail to establish individual involvement on the part of each defendant, and therefore the § 1983 claims must fail.

Plaintiffs contend Bell violated their First Amendment rights by denying them access to essential computer software and manuals, temporarily removing an Innovator computer without permission, failing to investigate break-ins to the newspaper's office, and canceling the November and December media board meetings. Plaintiffs contend Tommy Dascenzo, Judy Young, Peter Gunther and Francis Bradley violated their First Amendment rights by replacing the IBM computers with Macintosh ones, failing to investigate break-

ins to the newspaper's office, and holding a private meeting regarding plaintiffs' status as editors. Plaintiffs claim Debra Conway violated their First Amendment rights by failing to process Innovator requests and destroying Innovator advertisement forms. Plaintiffs contend Paul Schwellenbach violated their First Amendment rights by tampering with Innovator mail. Thus, viewed in a light most favorable to plaintiffs, there is evidence that defendants Bell, Dascenzo, Conway, Bradley, Gunther, Young and Schwellenbach individually participated in the asserted First Amendment violations.

Plaintiffs contend President Fagan and Vice President Keys participated in the asserted constitutional violations by failing to adequately investigate Dean Carter's phone calls to Regional Publishing. However, the doctrine of *respondeat superior* cannot be used to hold a supervisor liable for the asserted unconstitutional acts of a subordinate. *Chavez v. Ill. State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Zimmerman*, 226 F.3d at 574. Plaintiffs must show Keys and Fagan were personally involved in unconstitutional conduct, or that they approved or facilitated the conduct. *Chavez*, 251 F.3d at 651. But plaintiffs do not claim Keys and Fagan did anything more than fail to properly investigate Dean Carter's phone calls. A supervisor's negligence in detecting unconstitutional conduct is insufficient to hold the supervisor liable. *Id.* Plaintiffs also fail to present any evidence that Jane Wells or Peggy Woodard participated in constitutional violations. Therefore, summary judgment must be granted for defendants Keys, Fagan, Wells and Woodard.

III. Qualified Immunity

Alternatively, defendants argue the doctrine of qualified immunity bars plaintiffs' claims because their conduct did

not violate clearly established constitutional rights. Under the doctrine, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Upton v. Thompson*, 930 F.2d 1209, 1211-12 (7th Cir. 1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Plaintiffs bear the burden of showing that defendants' conduct violated a clearly established constitutional right. "This requires the plaintiff[s] to offer either a closely analogous case or evidence that the defendants' conduct is patently violative of the constitutional right that reasonable officials would know without guidance from the courts." *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994).

Plaintiffs claim Dascenzo, Bradley, Gunther and Young violated their First Amendment rights by replacing the IBM computers with Macintosh ones, failing to investigate break-ins to the newspaper's office, and holding a private meeting regarding plaintiffs' status as editors. Plaintiffs claim the Macintosh computers were not suitable for preparing a newspaper and therefore hindered their ability to publish the Innovator. They also claim the break-ins to the newspaper's office delayed publication of the Innovator and therefore inhibited their First Amendment right of expression. Plaintiffs do not present any case law that establishes a right to a certain type of computer or creates an affirmative duty on university officials to investigate crimes. Nor was the conduct of Dascenzo, Bradley, Gunther and Young patently violative of a constitutional right. Therefore, Dascenzo, Bradley, Gunther and Young are entitled to qualified immunity.

Plaintiffs claim Debra Conway violated their First Amendment rights by refusing to process Innovator materials and by destroying Innovator advertisement forms. Plaintiffs fail to present evidence that Conway's asserted actions were an attempt to frustrate their freedom of speech. Nor do they cite case law to support their claim. Because Conway's asserted conduct did not violate clearly established rights, she is entitled to qualified immunity.

Paul Schwellenbach is accused of destroying Innovator mail. Schwellenbach admits he returned mail to plaintiffs when the mail appeared to be personal and did not have proper postage. Plaintiffs present no evidence Schwellenbach's conduct was an attempt to frustrate their freedom of speech. Nor do plaintiffs cite authority to support their claim. Thus, Schwellenbach is entitled to qualified immunity.

Plaintiffs contend Bell inhibited their freedom of speech by canceling media board meetings that were necessary to obtain funds. The only case plaintiffs cite to support their claim against Bell is *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). In *Joyner*, a university president terminated the school newspaper's financial support because he disapproved of its editorial comment. The court held a college may not restrict speech "simply because it finds the views expressed by any group to be abhorrent." *Id.* at 460. Thus, the court found the president's withdrawal of financial support to be an unconstitutional prior restraint. *Id.* at 462.

Plaintiffs claim cancellation of media board meetings was the equivalent of withholding financial support. But *Joyner* is distinguishable because *Joyner* held it is unconstitutional for a college official to suppress speech *because he disagrees with the students' expression. Id.* at 460. Here, it is

undisputed the November and December meetings were canceled for legitimate reasons. Specifically, the November meeting was cancelled in order to allow Bell time to review the issues before the media board. Bell was appointed administrative liaison to the media board only one week prior to the November meeting. The December meeting was cancelled due to the hospitalization of media board chairman Ed Kammer. Thus, unlike the president in *Joyner*, Bell did not cancel the meetings in order to suppress plaintiffs' expression. Furthermore, Bell explicitly told plaintiffs in his December letter he would approve funding for the newspaper if they had an issue ready to be published. Therefore, plaintiffs fail to establish Bell violated a clearly established constitutional right by canceling the meetings.

Plaintiffs also claim Bell violated their First Amendment rights by replacing an Innovator computer containing confidential files without permission, denying them access to computer software, and failing to investigate break-ins to the newspaper's office. Plaintiffs fail to present evidence that Bell's actions were intended to inhibit their freedom of speech. Rather, it is undisputed Bell stored the computer software in his office for security reasons and removed and replaced the computer from the newspaper's office after plaintiffs complained it was non-functioning. After plaintiffs complained about the computer's removal, Bell returned it to their office. Plaintiffs also fail to establish Bell had a duty to investigate the break-ins or was responsible for them. Nor do plaintiffs cite any cases supporting their claims. Thus, Bell is entitled to qualified immunity.

Finally, plaintiffs claim Dean Carter's phone calls to Regional Publishing amounted to an unconstitutional prior restraint. Specifically, plaintiffs claim they were unable to publish the Innovator after Dean Carter's phone calls because

of her threats to withhold payment to Regional Publishing. Plaintiffs cite *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1992), *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970), and *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975), to support their claim.

In *Fujishima*, the Seventh Circuit struck down as a prior restraint a school board rule prohibiting student distribution of literature on school grounds without obtaining prior approval. 460 F.2d at 1357. In *Antonelli*, a university official refused to authorize the printing of future editions of the university newspaper unless an administrator first approved the newspaper's content. The *Antonelli* court opined that "[b]ecause of the potentially great social value of a free student voice . . . it would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate." *Id.* at 1337. The fact the university funded and created the newspaper was immaterial and the court held the policy was an unconstitutional prior restraint. *Id.* at 1337-38. *See also Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (it is unconstitutional for a public university to take adverse action against a student newspaper because of the content of the paper); *Joyner*, 477 F.2d at 460 (4th Cir. 1973) ("if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment").

In *Schiff*, the president of a state university dismissed the editors of the campus newspaper because the editors' poor grammar, spelling and language expression could have embarrassed the school. 519 F.2d at 257, 261. *Schiff* held the "right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances." *Id.* at 260. The court opined poor

grammar and language expression did not amount to "special circumstances" because these faults could not lead to a significant disruption on the university campus. Thus, the president's actions were unconstitutional. *Id.* at 261. Dean Carter was not constitutionally permitted to take adverse action against the newspaper because of its content or because of poor grammar or spelling. Accordingly, there is a disputed issue of material fact as to whether Dean Carter's asserted conduct violated plaintiffs' clearly established First Amendment rights.

Defendants argue *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), cast doubt on the cases cited by plaintiffs. The court disagrees. *Hazelwood* involved a high school newspaper that was part of a journalism class. There, the Court held no constitutional violation occurred when a high school principal removed two articles from the school newspaper. Central to the Court's holding was the fact the school never opened the pages of the paper to "indiscriminate use" by student editors, but rather maintained the paper as a supervised learning experience. *Id.* at 267, 270. Here, however, all editorial decisions were made by student editors and the Innovator was not part of a class, but was an autonomous student organization. The *Hazelwood* decision is also distinguishable because it involved a high school as opposed to a university. *Id.* at 273 n.7 ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level"). Therefore, Dean Carter is not entitled to qualified immunity.

CONCLUSION

The motion for summary judgment is granted as to all defendants except Patricia Carter.

November 13, 2001

/s/
Suzanne B. Conlon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARGARET HOSTY, et al.,	
Plaintiffs,	
v.	No. 01 C 0500
	Suzanne B. Conlon, Judge
GOVERNORS STATE UNIVERSITY, et al.,	
Defendants.	

MEMORANDUM OPINION AND ORDER

Margaret Hosty, Jeni Porche, Steven P. Baron, individually and doing business as Innovator (collectively "plaintiffs") sue Governors State University ("Governors State"), the Board of Trustees of Governors State ("the board"), Donald Bell, Tommy Dascenzo, Patricia Carter, Stuart Fagan, Paul Keys, Jane Wells, Debra Conway, Peggy Woodard, Frances Bradley, Peter Gunther, Ed Kammer, Dorothy Ferguson, Judy Young, Claude Hill IV, and Paul Schwellenbach (collectively "defendants") for prior restraint violations of the First Amendment (Count I), equitable relief (Count II), and punitive damages (Counts III), pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2202. Defendants move to dismiss for lack of jurisdiction and failure to state a claim.

BACKGROUND

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. Stachon v. United Consumers Club, Inc., 229 F.3d 673, 675 (7th Cir. 2000). Hosty, Porche, and Baron are students at Governors State and the editors and writers of a student-run newspaper, Innovator. Innovator is funded through student activity fees and is dedicated to distributing information and ideas pertinent to student life. Governors State is an Illinois university chartered by the general assembly, governed by the state, and supported primarily through government funds. The board, appointed by the governor, manages the university. Keys is provost, Wells and Woodard are associate provosts, Fagan is president, and Conway is secretary. Carter is dean of student affairs and Dascenzo is director of student life. Bradley, Gunther, Kammer, Ferguson, Young, and Hill are members of the communications board that regulates and appropriates Innovator's budget. Bell is administrative liaison between the university and Innovator. Schwellenbach supervises the university's mail room.

Defendants and their agents, acting under color of state law and outside the scope of authority, allegedly engaged in a campaign of prior restraints designed to frustrate plaintiffs' rights of freedom of speech and press. This purported campaign includes halting publication of Innovator, prohibiting future publication without approval of university administrators, and suspending Innovator's budget. Compl. at ¶¶ 24a-b. Further, defendants continue to provide unauthorized access to Innovator's office, and fail to investigate four office break-ins that resulted in criminal property damage. Id. at ¶¶ 24d-e. Defendants have allegedly

stolen, edited and deleted press mail and e-mail, and have interfered with plaintiffs' use of computer and communication systems. Id. at ¶¶ 24c,f,g,i,l-m. Defendants have destroyed materials essential to Innovator's operation, and have removed newspaper files. Id. at ¶¶ 24h,j. Finally, defendants have denied plaintiffs admittance to Innovator's office for more than a month. Id. at ¶ 24k.

DISCUSSION

I. Motion to dismiss standard

In ruling on a motion to dismiss, the court considers "whether relief is possible under any set of facts that could be established consistent with the allegations." Pokuta v. Trans World Airlines, Inc., 191 F.3d 834, 839 (7th Cir. 1999). Only if no set of facts would entitle the plaintiff to relief based on the complaint's allegations will a motion to dismiss be granted. Vonderohe v. B & S of Fort Wayne, Inc., 36 F. Supp.2d 1079, 1081 (7th Cir. 1999). The sufficiency of the complaint is tested by a motion to dismiss, not its merits. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990).

II. Jurisdiction and the Eleventh Amendment

A. Governors State University and its Board of Trustees

Defendants argue that plaintiffs' § 1983 claims against Governors State and the board are barred by the Eleventh Amendment. Eleventh Amendment issues arise whenever a private party files a federal lawsuit against a state, a state agency or a state official. Pennhurst v. State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-02 (1984); Gossmeyer v.

McDonald, 128 F.3d 481, 487 (7th Cir. 1997). This bar applies to any claim for which the state has not consented to be sued. Pennhurst, 465 U.S. at 100-01. Governors State and the board are arms of the state and may not be sued under § 1983. Kaimowitz v. Board of Tr. of Univ. of Ill., 951 F.2d 765, 767 (7th Cir. 1992); Raynard v. Board of Regents, 708 F.2d 1235, 1238-39 (7th Cir. 1983). Accordingly, plaintiffs' claims against Governors State and the board must be dismissed regardless of the nature of the relief sought.

B. Individual defendants sued in their official capacity

For purposes of the Eleventh Amendment, state representatives sued in their official capacity are considered the state, and this court is without jurisdiction to hear claims against them. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). It is assumed that a public official is sued in an official capacity where the conduct underlying the § 1983 claim concerns actions taken under color of state law. Kolar v. County of Sangamon of the State of Ill., 756 F.2d 564, 568 (7th Cir. 1985). The allegations against the university officials arise out of their official duties, and they are immune from suit for retrospective relief under § 1983. Will, 491 U.S. at 64; Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974); Kaimowitz, 951 F.2d at 767-68. Compensatory and punitive damages constitute retrospective relief and are barred. Quern v. Jordan, 440 U.S. 332 (1979). Thus, the claims for damages in Count I and III against the university officials in their official capacities are dismissed.

A federal court's remedial power, consistent with the Eleventh Amendment, allows the remedy of prospective declaratory and injunctive relief. Ex Parte Young, 209 U.S.

123 (1908). The motion to dismiss Count II as to the individual defendants in their official capacity is denied.

C. Individual defendants sued in their personal capacity and qualified immunity

Personal capacity suits raise no Eleventh Amendment concerns, even though an official might have the requisite nexus to the state for his actions to constitute state action. Kentucky v. Graham, 473 U.S. 159, 165-67 (1985). Thus, an action for compensatory and punitive damages is permissible. Defendants argue that plaintiffs sue the university officials only in their official capacity. But plaintiffs aver the university officials acted purposefully outside of the scope of their authority. Compl. at ¶ 24. This is sufficient to allege personal capacity claims against them. *See* Richman v. Sheahan, No. 98 C 7350, 2000 WL 343349, at *5 (N.D. Ill. Mar. 31, 2000); Benning v. Board of Regents of Regency Univ., No. 89 C 20072, 1990 WL 32305, at *3 (N.D. Ill. Feb. 12, 1990).

Alternatively, defendants argue qualified immunity prevents recovery of damages against them. Qualified immunity protects public officials from monetary liability when their conduct does not violate clearly established rights. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Kitzman-Kelley v. Warner, 203 F.3d 454, 457 (7th Cir. 2000). To determine whether an official's conduct violates clearly established law requires a two-step inquiry. First, plaintiffs must show that the law was clearly established when the challenged conduct occurred. The question is "whether the law was clear in relation to the specific facts confronting the public official when he or she acted." Apostol v. Landau, 957 F.2d 339, 341 (7th Cir. 1992). Second, the objective legal reasonableness of defendants' conduct is evaluated by

asking whether reasonably competent officials would agree on the application of the clearly established right to a given set of facts. Id. at 341. *See also* Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992).

Plaintiffs argue that since Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503 (1969) was decided, public school students have been entitled to freedom of expression protections guaranteed by the First Amendment, and that the United States Supreme Court extended these protections to student publications. Because of the long-standing precedent supporting freedom of speech and press at state universities, plaintiffs argue defendants could not have been unaware that their actions clearly violated plaintiffs' First Amendment rights. Defendants are immune from suit only if they were not on notice that their behavior was "probably unlawful." Montville v. Lewis, 87 F.3d 900, 902-03 (7th Cir. 1996). Efforts to frustrate students' freedom of speech has been a clear violation of law for well over a quarter of a century. The alleged closing of Innovator and other conduct designed to assert control over its publication; meddling with plaintiffs' communications; and denying plaintiffs access to Innovator for more than a month are all actions that would clearly violate plaintiffs' freedom of speech. Further, defendants admit that editorial control over Innovator would be a clear violation of law, but assert plaintiffs failed to allege conduct amounting to editorial control. However, viewed in a light most favorable to plaintiffs, defendants' conduct constitutes editorial control, and clearly violates established First Amendment law. Defendants are not entitled to qualified immunity.

III. Count I

First Amendment freedom of speech and freedom of press are protected from intrusion by state action by the Fourteenth Amendment. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938). Defendants argue that plaintiffs fail to allege personal involvement on the part of the university officials, and therefore the § 1983 claims must be dismissed. To be liable under § 1983, a defendant must be personally involved in the alleged constitutional deprivation. Zimmerman v. Tribble, 226 F.3d 568, 574 (7th Cir. 2000); Starzenski v. City of Elkhart, 87 F.3d 872, 879 (7th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997). However, plaintiffs allege that *all* defendants (including Governors State officials) are guilty of conduct that violates the First Amendment. Viewed in a light most favorable to plaintiffs, the complaint states a First Amendment claim against the university officials.

A. Freedom of speech

A key inquiry regarding plaintiffs' First Amendment claims is the type of forum Innovator involves. The forum dictates the extent and circumstances under which the government may intrude into the First Amendment rights of students. A public forum "by long tradition or by government fiat [is] . . . devoted to assembly and debate." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In a public forum, the state's right to limit expression is sharply circumscribed; restrictions may be enforced only if narrowly drawn to serve a compelling interest. Id. Similarly, time, place, and manner regulations are permitted only if narrowly tailored to serve an important government interest and leave ample alternative channels of communication. Id.

Defendants concede that Innovator serves as a public forum. Therefore, defendants face a heavy burden to justify the restrictions imposed on Innovator, including the arbitrary closing of this forum to plaintiffs until they submit to university screening of each issue's content; tampering with written communications regarding Innovator; and denying plaintiffs entry to Innovator's office. Defendants offer no governmental interest as a reason for their actions. Plaintiffs state a First Amendment claim for freedom of speech. Without any legal support, defendants argue only conduct motivated by attempts "to assert editorial control over the content of a university newspaper" violate the First Amendment, and that plaintiffs have not alleged such conduct. Def. Br. at 4-5. Editorial control is not required for a First Amendment claim; stifling freedom of speech in a forum opened for discussion is sufficient. Perry, 460 U.S. at 45-46; Tinker, 393 U.S. at 509-514. Moreover, plaintiffs have alleged editorial interference.

B. Freedom of press

As a state university newspaper, Innovator is entitled to constitutional protections afforded the press. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Papish v. Board of Curators of Univ. of Mo., 410 U.S. 667 (1973); Healy v. James, 408 U.S. 169 (1972). This includes editorial discretion regarding style and content. Miami Herald Publ'g Co., 418 U.S. at 258. State intrusion into this process violates the First Amendment freedom of press. Id. at 256. Innovator's expression is not unrestricted. Its freedom is tempered by the need to maintain order and discipline within the educational process. Tinker, 393 U.S. at 509, 511, 513; Bazaar v. Fortune, 476 F.2d 570, 575 (5th Cir. 1973). It is defendants' burden to make this showing. Tinker, 393 U.S. at 509.

Under liberal pleading standards, plaintiffs state a First Amendment claim. Plaintiffs allege defendants stopped publication of Innovator and, without justification, refused to publish more issues without the approval of Governors State administrators. Absent a constitutionally viable reason for their actions, defendants' alleged imposition would violate the First Amendment. *See* Fujishima v. Board of Educ., 460 F.2d 1355, 1357-58 (7th Cir. 1972); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970); ACLU of Va. v. Radford Coll., 315 F. Supp. 893, 896-97 (W.D. Va. 1970). Plaintiffs also allege defendants impeded their freedom of press rights by suspending Innovator's budget without explanation. This too violates freedom of press rights. Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983); Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970).

Additionally, plaintiffs allege numerous other instances where defendants inhibited Innovator's continued operation, including destruction of materials and refusal to perform functions necessary for publication. These actions would violate the First Amendment. Bigelow v. Virginia, 421 U.S. 809, 829 (1975).

IV. Counts II and III

Defendants argue that by incorporating the allegations of Count I, Counts II and III are merely duplicative and should be dismissed. A reading of the first amended complaint shows this argument is frivolous. The relief sought in Count II is equitable, while Count III seeks punitive damages. These remedies are substantively different than the compensatory damages sought in Count I. To the extent plaintiffs also request injunctive relief in Count I, that prayer for relief is stricken.

CONCLUSION

The motion to dismiss is granted as to Governors State University and its Board of Trustees on all claims, and to the individual defendants in their official capacity in Counts I and III. The motion is denied as to the individual defendants in their personal capacity on all claims and in their official capacity on Count II. The claim for injunctive relief in Count I is stricken.

April 27, 2001

/s/
Suzanne B. Conlon
United States District Judge

UNITED STATES COURT of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 25, 2003

BY THE COURT:

No. 01-4155

MARGARET HOSTY, JENI PORCHE, and STEVEN P. BARBA, individually and d/b/a INNOVATOR,
Plaintiffs-Appellees,

v.

PATRICIA CARTER,
Defendant-Appellant,

and

GOVERNORS STATE UNIVERSITY, et al.,
Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 01 C 0500

Suzanne B. Conlon,
Judge.

ORDER

A majority of judges in active status have voted to grant the petition for rehearing en banc in this case. Accordingly, the April 10, 2003, panel decision is VACATED. A date for oral argument before the full court will be set in the near future.

CONSTITUTIONAL PROVISIONS INVOLVED:

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the member of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the

whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISION INVOLVED:

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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SUPREME COURT, U.S.

No. 05-377

In the Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA,
PETITIONERS,

v.

PATRICIA CARTER, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988), this Court declined to decide if post-secondary public school officials may reasonably regulate the content and style of school-sponsored speech for legitimate pedagogical purposes in a non-public forum. Petitioners, who were editors and a staff reporter of *Innovator, The Newspaper of Governors State University* (GSU), filed this suit against respondent Dean Patricia Carter (among others), alleging that she violated their First and Fourteenth Amendment rights by requiring pre-publication review of the paper. Sitting *en banc*, the Seventh Circuit agreed with petitioners that a reasonable jury could find that *Innovator* was not a non-public forum and thus was not subject to editorial control by GSU administrators. The court granted summary judgment for Dean Carter on qualified immunity grounds, however, holding that not all reasonable university officials in her shoes had to know that *Innovator* was not a non-public forum because "factual and legal uncertainties dog the litigation."

The question presented is whether the Seventh Circuit erred in holding that Dean Carter was entitled to qualified immunity, given the "cloudy" facts in the record on summary judgment and petitioners' concession that judges disagree even today about if and how *Hazelwood* applies to post-secondary schools.

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BRIEF IN OPPOSITION

STATEMENT

A. From May 2000 through April 2001, petitioners Jeni Porche and Margaret Hosty were the Editor-in-Chief and Managing Editor, respectively, of *Innovator, The Newspaper of Governors State University* (GSU); petitioner Steven Barba was a staff reporter. Docs. 36, 43 at ¶¶ 17-20. Contrary to petitioners' repeated characterization of the paper as operating "outside of" or "separate and apart from" GSU's curriculum (*see, e.g.*, Pet. i, 20, 25 n.10, 26), class credit (or work-study status or a stipend) could be requested as compensation for working on the paper (Doc. 44 at Hosty dep. at 11-12). The parties agree that petitioners Porche and Hosty each received a $4,500 stipend for the year. Docs. 36, 43 at ¶ 33; Doc. 44 at Hosty dep. at 14.

GSU's Student Communications and Media Board (the SCMB) published *Innovator*, which was funded by student activities fees. Pet. App. 11a. According to its charter, the SCMB was "responsible to the Director of Student Life," who in turn was a subordinate of respondent Patricia Carter, GSU's Dean of Student Affairs and Services. Pet. App. 11a-12a. GSU's media policy states that the student staff determines the content and format of each publication without censorship or advance approval. Pet. App. 11a.

Like other SCMB media, *Innovator* had a faculty advisor. Pet. App. 12a. The parties agree that the "normal procedure" was to have the faculty advisor sign off on the paper before it went to the printer. Docs. 36, 43 at ¶ 46. They also agree that after August 2000, *Innovator*'s advisor (Geoffrey de Laforcade) was no longer a GSU faculty member and instead was employed at a college in Carlinville, Illinois. Docs. 36, 43 at ¶ 44.

B. The October 31, 2000 issue of *Innovator* contained several articles by petitioner Hosty. Doc. 44 at Fagan dep. at exhibit. One criticized the coordinator of GSU's English department, another criticized GSU's Dean of the College of Arts and Sciences concerning the decision not to renew de Laforcade's employment contract, and a third reported on a GSU student senate meeting at which the senate president had criticized GSU President Stuart Fagan. *Id.* Another student wrote a column criticizing GSU's financial aid office (*id.*), which was under Dean Carter's aegis (Doc. 44 at Carter dep. at 25).

On or around October 31, 2000, Dean Carter called the printer and instructed him not to print any more issues of *Innovator* without first calling her so that she or someone from the administration could read and approve it. Pet. App. 2a. She called again later and made the same request. Doc. 44 at Richards affidavit.

On November 3, 2000, GSU President Fagan distributed to the GSU community a memorandum he wrote to petitioner Porche, criticizing the October 31, 2000 issu as "an angry barrage of unsubstantiated allegations that essentially – and unfairly – excoriated some members of the university faculty and administration (myself included)." Doc. 44 at Fagan dep. at exh. 2. On November 16, 2000, petitioner Porche responded in an open letter to the GSU community on *Innovator*'s letterhead.[1] Doc. 43 at exh. B.

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[1] When the Illinois College Press Association (ICPA) investigated Porche and Hosty's censorship claims, it concluded that they and de Laforcade had committed "several ethical lapses": (1) Porche and Hosty reported on the student senate even though they were senate members; (2) they printed de Laforcade's letter to the editor criticizing the administration

Petitioner Porche decided not to submit another issue of *Innovator* for publication; she felt that the "chief deterrent" to publishing subsequent issues was the SCMB, which controlled the paper's funds. Doc. 44 at Porche dep. at 36, 60; *see also* Pet. App. 39a. She and petitioner Hosty continued to work on articles for the paper, and they continued to be paid their stipends. Docs. 36, 43 at ¶¶ 28-29, 33.

C. In January 2001, petitioners sued Dean Carter as well as GSU itself, GSU's Board of Trustees, and several other GSU administrators, faculty members, and students, alleging violation of their First and Fourteenth Amendment rights. Pet. App. 35a. After dismissing GSU and its Board of Trustees on sovereign immunity grounds (Pet. App. 52a), the district court found that all remaining defendants except Dean Carter were entitled to summary judgment on the merits or on qualified immunity grounds (Pet. App. 34a-48a). Citing pre-*Hazelwood* cases holding that to require pre-publication review of a paper created and funded by a public university was unconstitutional, petitioners argued that Dean Carter's calls to the printer violated clearly established First Amendment law. Pet. App. 46a-47a.

In a single paragraph, the district court found that Dean Carter was not entitled to qualified immunity. Pet. App. 47a. It disagreed with her argument that *Hazelwood* cast doubt on

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about a faculty member's employment situation; (3) they wrote stories about the English Department coordinator, who was also one of their teachers, which appeared to be a conflict of interest; and (4) the paper blurred the line between news and commentary, particularly in its coverage of the student senate. Doc. 43 at exh. C. ICPA also believed that GSU administrators, including Dean Carter, had acted inappropriately. *Id.*

petitioners' pre-*Hazelwood* authorities because (1) *Hazelwood* concerned a "supervised learning experience," whereas *Innovator* was an "autonomous student organization"; and (2) *Hazelwood* applied only to high schools, relying on *Hazelwood*'s footnote declining to decide the degree of deference to be accorded to school-sponsored speech in post-secondary schools. *Id.* (citing 484 U.S. at 273 n.7).

Dean Carter appealed this interlocutory order, and a three-judge panel of the Seventh Circuit affirmed (Pet. App. 25a-33a), but the full court vacated that opinion (Pet. App. 59a).

D. After rehearing *en banc*, the Seventh Circuit reversed on the second step of the qualified immunity analysis in *Saucier v. Katz*, 533 U.S. 194 (2001). Pet. App. 1a-15a. On the merits, the court agreed with petitioners that a reasonable jury could conclude that *Innovator* was not a non-public forum and thus was beyond the control of GSU administrators. Pet. App. 10a-12a. It held, however, that Dean Carter was entitled to summary judgment on qualified immunity grounds because "both legal and factual uncertainties dog the litigation." Pet. App. 10a-15a.

Before addressing the merits, the court briefly reviewed *Hazelwood*, which concerned a newspaper produced by a high school journalism class and financed with public funds. Pet. App. 4a. The court noted that the *Hazelwood* court began by first applying public forum analysis and determining that the paper was a non-public forum due to the school's policy and practice of supervising the writing and reviewing the content of each issue. *Id.* (citing 484 U.S. at 267-70). The court observed that *Hazelwood* distinguished the newspaper articles from the students' independent speech in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), on the ground that the school in *Hazelwood* subsidized the paper's costs. Pet. App. 4a. The court reasoned that under *Hazelwood*, school-funded

speech may be regulated when "reasonably related to legitimate pedagogical concerns," which permits setting standards for speech disseminated under its auspices that are even higher than "real world" standards. Pet. App. 5a (citing 484 U.S. at 271-72). The court added that in a footnote, *Hazelwood* explicitly declined to decide if the "substantial deference" lower federal courts had accorded educators' decisions about the content of school-sponsored expressive activities was appropriate at the post-secondary school level. Pet. App. 5a (citing 484 U.S. at 273-74 n.7).

Next, the Seventh Circuit rejected petitioners' (and the district court's) reading of the *Hazelwood* footnote to mean that high school newspapers are reviewable but college newspapers are not. Pet. App. 5a. It stressed that the footnote addressed only degrees of deference, adding that "[w]hether *some* review is possible depends on the answer to the public-forum question, which does not (automatically) vary with the speakers' age." Pet. App. 5a (emphasis in original). The court agreed with petitioners that age comes into play when courts assess the reasonableness of an asserted pedagogical justification in a non-public forum, *e.g.*, when the justification is audience maturity. Pet. App. 6a. By contrast, the court suggested, when the justification depended on a desire to ensure high standards (for, *e.g.*, grammar, style, research, or lack of bias) for speech disseminated in non-public forums and under the school's auspices, there would be "no sharp difference between high school and college papers." *Id.* Noting that even adult speech may be reasonably regulated in non-public forums when government-funded, while in designated public forums, viewpoint-based restrictions on private speech are forbidden even in elementary schools, the court concluded that "age does not control the public-forum question." *Id.* at 6a-7a (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)).

The Seventh Circuit then rejected petitioners' (and the district court's) view that *Hazelwood* had deemed the paper there a non-public forum based solely on its curricular status. Pet. App. 8a-9a. As support, it offered examples of school-sponsored extracurricular speech in which "the right to control would be evident," *e.g.*, a student's article in the alumni magazine for which college credit or payment is given. Pet. App. 9a. The court reasoned that "being part of the curriculum may be a *sufficient* condition of a non-public forum, [but] it is not a *necessary* condition. Extracurricular activities may be outside any public forum . . without also falling outside all university governance." *Id.* (emphases in original). The court reasoned that the public-forum analysis used in *Hazelwood* applies to all school-subsidized newspapers, later adding that *Hazelwood*'s framework "depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities." Pet. App. 7a, 13a.

Turning its attention to the merits of petitioners' claims, the Seventh Circuit first asked if *Innovator* was a non-public forum, for only then would it matter if Dean Carter's calls to the printer were justified by legitimate pedagogical concerns. Pet. App. 10a. The court then agreed with petitioners that a reasonable trier of fact could conclude from the record that *Innovator* was a designated public forum, which put the paper beyond the control of GSU administrators. *Id.* The court, however, "d[id] not think it possible on this record to determine what kind of forum the University established or [to] evaluate Dean Carter's justifications." *Id.* In particular, the court noted, the SCMB's rules were ambiguous, its charter provided that it was responsible to Director of Student Life, who appeared to be a subordinate of Dean Carter, and the parties disagreed about the identity of the advisor and the extent of his control. Pet App. 11a-12a.

Addressing the second step in the qualified immunity analysis, the Seventh Circuit pointed out that the district court itself had reached the wrong conclusions about if and how *Hazelwood* applied to colleges generally and to extracurricular speech in particular. Pet. App. 13a. Even if the constitutional framework did differ for high school and colleges, the court held, "it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule." *Id.* As support, the court cited (among other authorities) the *Hazelwood* footnote, noting that the First Circuit had misconstrued this footnote as a holding that the deference accorded to high school educators did not apply at the college level. *Id.* (citing *Student Gov't Ass'n v. Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989)). Emphasizing that the Seventh Circuit itself had not spoken on the issue, the court described other circuits' approach as "hard to classify" and added that "[m]any aspects of the law with respect to students' speech . . . are difficult to understand and apply . . . ." Pet. App. 13a-14a (citing *Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (*en banc*), and *Brown v. Li*, 308 F.3d 939 (9th Cir. 2003)). Under these circumstances, the court held, Dean Carter was entitled to qualified immunity because "the implementation of *Hazelwood* means that both legal and factual uncertainties dog the litigation." Pet. App. 14a. These uncertainties, the court reasoned, "make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator*'s printing bills violated the first amendment." Pet. App. 14a-15a.

The three members of the original panel (joined by a fourth judge) dissented. Pet. App. 15a-24a. They quarreled with the majority's view that *Hazelwood*'s deferential standard would apply to a non-public forum at the college level, on the ground that "[a]ge . . . has always defined legal rights" and the schools' missions are different. Pet. App. 15a-21a. The dissent also

disagreed with the holding that Dean Carter was entitled to qualified immunity, on the ground that "*Hazelwood* did not change th[e] well-established rule" that "university administrators could not require prior review of student media or otherwise censor student newspapers." Pet. App. 21a-22a.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari.

As a threshold matter, the petition is internally, and fatally, inconsistent. Even though petitioners insist (as they did in the courts below) that the law was "clearly established" (Pet. 20), they now contend that confusion abounds in the lower courts about if and how *Hazelwood* applies in post-secondary schools (Pet. 23-29). This latter argument necessarily means that petitioners cannot plausibly quarrel with the Seventh Circuit's holding that Dean Carter was entitled to summary judgment on qualified immunity grounds under *Saucier*'s second prong.

Another reason to deny the petition is that this case presents a particularly poor vehicle for addressing if and how the *Hazelwood* standard applies in post-secondary schools. Here, the Seventh Circuit *agreed* with petitioners that a reasonable jury could conclude that *Innovator* was a designated public forum, so the court did not apply the *Hazelwood* standard to it. Under these circumstances, what petitioners seek is this Court's advice about the Seventh Circuit's observations concerning if and how *Hazelwood* might apply to a non-public forum, which the court expressed when addressing the first *Saucier* prong and which were technically dicta. Though these legal questions may be interesting ones in a proper case, this Court does not grant certiorari either to issue advisory opinions or to review dicta. Moreover, even if that question were resolved in petitioners' favor, it would make no difference to the judgment here – they admit that judges disagree about the applicability of

Hazelwood to colleges.

Likewise, petitioners' (and their amici's) rank speculation that the Seventh Circuit's opinion will have dire consequences for free speech in post-secondary schools does not justify this Court's review. On the contrary, the Seventh Circuit *agreed* with petitioners' view that *Innovator* was not subject to control by GSU administrators because it was a designated public forum, and the court implied that its broad view would apply to other designated public forums, regardless of the speaker's age.

Petitioners are wrong to argue that the Seventh Circuit's use of forum analysis or its qualified immunity holding squarely conflicts with opinions by this Court and the circuit courts. No other court has held that forum analysis does not apply to post-secondary school speech. To the contrary, the Seventh Circuit's use of forum analysis here is completely consistent with its application by this Court and the circuit courts, regardless of the speaker's age or the extracurricular nature of the speech. Likewise, no opinion by this Court or a circuit court would necessarily lead that court to deny Dean Carter qualified immunity on the record here. Thus, no square conflict exists that warrants this Court's resolution.

For these reasons alone, certiorari should be denied. At bottom, however, petitioners (and their amici) seek this Court's review because they believe the Seventh Circuit wrongly held that Dean Carter was entitled to qualified immunity. As noted above, however, petitioners' admission that there is disagreement about if and how *Hazelwood* applies to post-secondary schools necessarily means that the Seventh Circuit got that dispositive and ultimate question right.

I. Given Petitioners' Concession That Judges Disagree Over If and How *Hazelwood* Applies to Colleges, They Necessarily Concede the Judgment Against Them Was Correct.

Petitioners admit, nay trumpet, the disagreement among federal judges about if and how *Hazelwood* applies to colleges. Pet. 23-29. They complain of "a host of conflicting analyses," multiple dissenting opinions, and the need for two *en banc* opinions in cases concerning post-secondary school speech. Pet. 23. This argument, however, fatally undermines their contention that Dean Carter was not entitled to qualified immunity. *See, e.g.*, Pet. 20. Because they concede that the law is not "clearly established" today, they necessarily agree that the law was not clearly established in 2000. Thus, they perforce concede that the judgment against them was correct. Accordingly, this Court's review is not warranted here. *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam)* (holding that "[t]his Court reviews judgments, not statements in opinions") (internal quotation marks omitted).

That the law governing the applicability of *Hazelwood* to Dean Carter's calls to *Innovator*'s publisher was not "clearly established" in 2000 cannot be gainsaid, as amply demonstrated by the disagreement among the twelve judges who have considered this case. In addition, the *Hazelwood* Court explicitly reserved the question of whether university officials are entitled to the same degree of deference accorded their high school counterparts when regulating a school-sponsored non-public forum. 484 U.S. at 273 n.7. As the Seventh Circuit observed, this Court does not reserve ruling on a question with a "clearly established" answer. Pet. App. 13a (citing *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999)). Similarly, if the applicability of *Hazelwood* here were "clearly established" when Dean Carter called the printer in October and November 2000, post-secondary school students and their relations to their

schools would have been more than "at least *arguably* distinguishable from their counterparts in college education" in May 2000. *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217, 238 n.4 (Souter, J., concurring) (emphasis added). Lastly, if the law were "clearly established" in 2000, petitioners could not argue that there is "confusion" and "uncertainty" about the law in the lower courts today. Pet. 23-29.

As an example of disagreement among judges about if and how *Hazelwood* applies to post-secondary schools, Petitioners (like the Seventh Circuit) point to *Kincaid*. Pet. 23-24. A careful reading of the Sixth Circuit's panel and *en banc* decisions demonstrates that Dean Carter is entitled to qualified immunity, for both before and after her calls to the printer in 2000, those judges disagreed about whether the evidence showed that the yearbook there was a non-public forum and what standard was applicable when regulating it.

In *Kincaid*, a university official confiscated the yearbook based on objections to its color, theme, quality, and contents. 236 F.3d at 345. Prior to Dean Carter's calls to the printer in 2000, the panel majority held that the yearbook was a non-public forum even though it was not a classroom product, which meant (under *Hazelwood*) that the university could reasonably regulate its contents. 191 F.3d at 726-29 & nn.2-3 (citing *Hazelwood*). One judge dissented from both the evidentiary ruling that the yearbook was a non-public forum and from the majority's application of *Hazelwood*'s deferential standard to it, noting that no circuit court had yet decided the question the *Hazelwood* footnote had left unanswered. *Id.* at 730 & n.1 (Cole, J., concurring in part and dissenting in part). In 2001, *after* Dean Carter's calls, the full court concluded that the yearbook was a limited public forum and that the confiscation failed both the strict scrutiny standard for content-based regulation and the reasonableness standard for time, place and manner restrictions. 236 F.3d at 347-56. Significantly, the

Kincaid court explicitly stated that its ruling "has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper." *Id.* at 348 n.6. Moreover, this opinion was not unanimous. Judge Boggs expressed his view that even in limited public forums, "some minimum standards of competence could be a reasonable 'manner' restriction." *Id.* at 358 (Boggs, J., concurring in part and dissenting in part). Judge Norris, the author of the panel decision, continued to believe that the yearbook was a non-public forum, reiterating that in such forums, regulation "need not be the most reasonable or the only reasonable limitation." *Id.* at 359 (Norris, J., dissenting) (internal quotation marks omitted).

As petitioners also note, two Ninth Circuit judges disagree about if and how the *Hazelwood* standard applies to curricular speech, in a decision that post-dates Dean Carter's calls. Pet. 24-25 (citing *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002)). There, using three different rationales, two of which addressed *Hazelwood*, the court upheld the university's right to disapprove the content of a student's thesis. Judge Graber concluded that because the thesis was curricular speech, it was a non-public forum under *Hazelwood*, so educators could apply the deferential *Hazelwood* standard and disapprove it for failure to meet legitimate academic standards. *Id.* at 944-55. Judge Reinhardt, however, interpreted *Hazelwood* as holding that school-sponsorship, not curriculum status, was determinative on the public forum question, and he believed that which standard to apply to school-sponsored college speech was an open one. *Id.* at 956-67 (Reinhardt, J., concurring in part and dissenting in part). In his view, *Hazelwood*'s deferential standard was inapplicable to the thesis, and he suggested other possible standards, stressing that "different First Amendment standards [may be] applicable in different contexts to restrictions imposed at the university level depending on both the speaker and the nature of the particular forum" and the

importance of "distinguish[ing] student speech from university speech . . . and the speech of private individuals using the university's facilities." *Id.* at 960-64 (Reinhardt, J., concurring in part and dissenting in part). The third judge concluded that the speech was deceptive and thus not entitled to First Amendment protection. 308 F.3d at 955-56 (Ferguson, J., concurring in part).

Put simply, *Kincaid* and *Brown* (and the lower court's rulings here) convincingly demonstrate that judges disagreed even after Dean Carter's calls to the printer about if and how *Hazelwood* applies to post-secondary schools. In light of these disagreements, the *Hazelwood* Court's reservation of the question, and the lack of a Seventh Circuit opinion on this point heretofore, Dean Carter is entitled to qualified immunity.

II. This Case Is a Poor Vehicle For Determining If and How *Hazelwood* Applies to Post-Secondary Schools.

However interesting and important may be the question of if and how *Hazelwood* applies to post-secondary schools, this case is not the right vehicle for resolving that question, on at least two grounds. One is that what petitioners want is this Court's advice about the Seventh Circuit's reasons for holding in their favor on the merits (*i.e.*, the first *Saucier* prong). Even if this Court were to "reverse" that reasoning, reversal would be without any effect on the court's ultimate qualified immunity holding (*i.e.*, the second *Saucier* prong). The other reason this case is a poor vehicle for addressing *Hazelwood*'s applicability to non-public forums at colleges is that petitioners' speculation about the dire consequences of the Seventh Circuit's reasoning are premature at best. Nothing in the opinion indicates that courts will be more likely to hold that a college forum is non-public in nature (and thus subject to *Hazelwood*'s deferential standard) or that colleges will be more likely to impose more and greater restrictions on speech.

Here, when addressing the merits prong of Dean Carter's qualified immunity defense, the Seventh Circuit *agreed* with petitioners that a reasonable jury could conclude that *Innovator* was a designated public forum and thus "beyond the control of the University's administration."[2] Pet. App. 10a. Not surprisingly, petitioners do not ask this Court to review that holding. They also do not seek this Court's review of the Seventh Circuit's *agreement* with their argument that if a school justifies editorial control in a non-public forum based on the audience's maturity, age matters. Pet. App. 6a.

Instead, petitioners invite this Court to review just the Seventh Circuit's reasons for agreeing with them on the merits and its dicta about *Hazelwood*'s applicability to other, non-public forums. In effect, petitioners want this Court to "reverse" the Seventh Circuit's view that the *Hazelwood* standard of deference would have applied to *Innovator* if it had been a non-public forum. They also want this Court to "reverse" the court's dicta that being part of the curriculum is

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[2] To the extent that it implied that designated public forums cannot be regulated at all, the court misstated the law. Content-based regulation is permitted in a designated public forum to preserve the limited purposes of that forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). Moreover, even in public forums, content-based regulation is permitted when necessary if narrowly tailored to achieve a compelling government interest; in addition, certain time, place, and manner restrictions are permitted as well, so long as ample alternative channels of communication are left open. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In a designated public forum, reasonable "manner" restrictions could include "minimum standards of competence." *Kincaid*, 236 F.3d at 358 (Boggs, J., concurring in part and dissenting in part).

not a necessary condition for a non-public forum. This Court, however, does not sit to review such matters. *Bunting v. Mellen*, 514 U.S. 1019, ___, 124 S. Ct. 1750, 1754 (2004) (Scalia, J., dissenting from the denial of certiorari). Moreover, even if these matters were resolved in petitioners' favor, that ruling would make no difference to the judgment that Dean Carter was entitled to qualified immunity given that judges have continued to disagree about *Hazelwood*'s applicability to colleges even after Dean Carter's calls to the printer in 2000. Thus, no matter how interesting the petition's legal questions may be, this case is not the right vehicle for resolving them. *Belda v. Marshall*, 416 F.3d 618, 620-21 (7th Cir. 2005) (federal courts do not issue advisory opinions, no matter how interesting the question).

The other ground petitioners (and their amici) raise for granting their petition is a parade of horribles, which is based on their speculation that the Seventh Circuit's dicta will have broad effects on other courts' rulings on expressive activity. Pet. 28-29. Not one of the rulings they cite, however, concerns a college newspaper. Instead, the opinions concern completely different types of restrictions (speech codes and speech zones) and completely different types of speech (extracurricular, obviously private speech). *Id.* Petitioners likewise speculate that the decision "will surely accelerate the promulgation of such regulations across the nation." Pet. 27-29 & nn.12-13. In fact, petitioners *won* on the merits, and that ruling on the merits has "clearly established" the law for certain designated public forums in the Seventh Circuit. Thus, the effect of the Seventh Circuit's opinion is more likely to be that college papers will be found *not* to be non-public forums and thus *not* subject to *Hazelwood*'s deferential standard. Petitioners' rank speculation to the contrary is premature at best and illogical at worst. It is no reason for granting their petition.

III. The Seventh Circuit's Opinion Creates No Certworthy Conflict With Any Opinion by This Court or the Other Circuits.

Petitioners contend that the Seventh Circuit's analysis squarely conflicts with opinions from this Court and other circuit courts. Pet. 12-20. Not so. The Seventh Circuit's decision here is nothing more, and nothing less, than a straightforward application of forum analysis, and neither this Court nor any circuit court has directly rejected the use of forum analysis for college speech. Likewise, neither this Court nor any circuit has issued an opinion that would deny Dean Carter qualified immunity here. Indeed, there can be no such opinion – as petitioners themselves maintain, federal judges disagree about if and how *Hazelwood* applies to colleges.

A. The Seventh Circuit's Use of Forum Analysis Creates No Certworthy Conflict.

Under this Court's well-settled First Amendment jurisprudence, the first step when determining the degree of deference accorded to government restrictions on speech in any government-created forum is to determine the nature of that forum, even for adult speakers and audiences. *See, e.g.*, *Perry*, 460 U.S. at 45-48 (applying forum analysis to intra-school mail system for adult staff); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1984) (same, to advertising on city-owned buses); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-06 (1985) (same, to charity drive aimed at federal employees); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-83 (1992) (same, to airport); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-82 (1998) (same, to debate on publicly-owned television station); *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 205-07 & n.3 (2003) (same, to internet access in public libraries).

Significantly, this Court applied forum analysis even to extracurricular speech in post-secondary schools before and after *Hazelwood*. In *Widmar v. Vincent*, 454 U.S. 263 (1981), for example, this Court applied forum analysis to a university policy denying religious groups the use of school facilities generally available to registered student groups.[3] Indeed, *Widmar* demonstrates that petitioners' view of students' First Amendment rights at colleges as completely unfettered is far too broad. There, this Court "recognized that such rights must be analyzed 'in light of the *special characteristics of the school environment.*'" *Id.* at 267 n.5 (emphasis added) (quoting *Tinker*, 393 U.S. at 506). *Widmar* also negates petitioners' assumption that a college paper is never a non-public forum, stressing that "a university differs in significant respects from public forums. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.*; *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (holding that "*[a]cademic freedom thrives . . . on autonomous decisionmaking by the academy itself*" as well as the exchange of ideas) (emphasis added).

In fact, this Court applied forum analysis in one of petitioners' primary authorities (*Rosenberger*, 515 U.S. 819) to a public university's denial of an application for student activity

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[3] Of additional significance here is that the *Widmar* court "doubt[ed] students could draw any reasonable inference of University support from the mere fact of a campus meeting place" in light of the more than one hundred recognized student groups at the university. *Id.* at 274 n.14. By contrast, the full title of the paper here (*Innovator, The Newspaper of Governors State University*) makes eminently reasonable an inference of GSU support.

funds for a Christian student group's newspaper, based solely on paper's Christian viewpoint. Petitioners' contention that the Seventh Circuit's decision conflicts with *Rosenberger* (Pet. 13-14) is right, but for the wrong reason. As explained above, the Seventh Circuit's view that designated public forums are outside a college's control conflicts with *Rosenberger*. 515 U.S. at 829-30 (holding that content regulation may be permissible in limited public forum to preserve purposes of that forum). However, and more significant for present purposes, *Rosenberger* supports the Seventh Circuit's views on government-subsidized speech. *Id.* at 833-34 (stressing that when the government "*subsidize[s]* transmittal of a message it favors," it "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee" because "when the State is the speaker, it may make content-based choices") (emphasis added). The same is true of *Southworth*. 529 U.S. at 228-35 (observing that university could impose mandatory activity fee program for funding extracurricular student speech, which it disclaimed, but if *extracurricular* speech were financed by tuition dollars and university were responsible for its content, "the case might be evaluated on the premise that the government itself is the speaker," because when a university speaks through its agents or employees, "the analysis likely would be altogether different") (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983)).

Like the *Widmar* and *Rosenberger* courts, circuit courts have applied forum analysis to post-secondary schools, to both curricular and extracurricular speech and to both faculty and student speech. *See, e.g.*, *Kincaid*, 236 F.3d at 356 (holding that the district court had "simply misapplie[d] well-established public forum law"); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1549 (11th Cir. 1997) (analyzing challenge to university's system of funding for student groups by concluding that funding system was limited public forum, so content could

be regulated to preserve fund's limited purposes (citing *Rosenberger*)); *Bishop v. Aronov*, 926 F.2d 1066, 1071-74 (11th Cir. 1991) (rejecting professor's challenge to restrictions on his assertions of religious beliefs and holding that "insofar as [*Hazelwood*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284-89 (10th Cir. 2004) (concluding that classroom was non-public forum, so officials could regulate student's classroom speech "in any reasonable manner," citing *Hazelwood,* and holding that speech was "school-sponsored" because the "imprimatur concept covers speech that is so closely connected to the school that it appears the school is sponsoring the speech'" and "[t]the 'pedagogical' concept merely means that the activity is 'related to learning'").

As these cases amply demonstrate, the Seventh Circuit's application of forum analysis to *Innovator* is fully consistent with opinions by this Court and other circuits.

B. The Seventh Circuit's Holding That Dean Carter Was Entitled to Qualified Immunity Creates No Certworthy Conflict.

As indicated in Part II above, petitioners do not contend that the Seventh Circuit's *agreement* with their view that *Innovator* was a designated public forum (and thus was not subject to GSU's regulation) creates a conflict for this Court's review. Likewise, as explained in Part I above, the disagreement among federal judges about *Hazelwood*'s applicability to post-secondary schools – which Part III of the petition concedes – necessarily means that the Seventh Circuit's holding that Dean Carter is entitled to qualified immunity can create no square conflict for this Court's review.

Petitioners nevertheless insist that the law was "consistently

clear" prior to *Hazelwood*, relying on pre-*Hazelwood* lower court cases, including district court cases. Pet. 20-22. Because *Hazelwood* explicitly reserved the question of how much deference should be accorded to college officials regulating non-public forums, the question plainly had no "clearly established" answer. Pet. App. 13a (citing *Wilson*, 526 U.S. at 614-18). Furthermore, logic dictates that a case decided before *Hazelwood* reserved this question simply cannot create any conflict about if and how the *Hazelwood* applies. As for petitioners' per-*Hazelwood* district court authorities, district court decisions cannot "clearly establish" the law (*Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995)), so any conflict with a district court ruling is surely no reason for granting this petition.

Tellingly, petitioners point to no post-*Hazelwood* opinion by this Court or any circuit court that would necessarily require a finding that Dean Carter is not entitled to qualified immunity. As the Seventh Circuit explained, the First Circuit was mistaken when it relied solely on the *Hazelwood* footnote for its holding that this Court "holds" *Hazelwood*'s approach is inapplicable to non-public forums in post-secondary schools. Pet. App. 13a (citing *Student Gov't Ass'n*, 868 F.2d at 480 n.6). *Kincaid* creates no square conflict – the Sixth Circuit explicitly stated that its *en banc* ruling about the yearbook "ha[d] no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper." 236 F.3d at 348 n.6. As for *Brown* (308 F.3d 939), the three different rationales employed there (to curricular speech) cannot be construed as creating any conflict with the Seventh Circuit's holdings here.

In sum, petitioners failed to demonstrate that the Seventh Circuit's qualified immunity ruling conflicts with any opinion by this Court or any other circuit court.

C. The Seventh Circuit's Opinion Creates No Certworthy Conflict With *Healy* and Its Progeny.

Petitioners insist that the Seventh Circuit's opinion conflicts with *Healy v. James*, 408 U.S. 169 (1972), "and its progeny." Pet. 12-20. Other than cases petitioners string-cite concerning the age and maturity of college students or broad First Amendment principles, however, they identify just two cases as *Healy*'s "progeny": *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973), and *Rosenberger*. *Id.* As explained above, the only conflict with *Rosenberger* is the Seventh Circuit's implication that designated public forums cannot be regulated at all. Likewise, the Seventh Circuit's ruling creates no conflict with *Healy* or *Papish*, both of which pre-date the forum analysis cases cited above as well as *Hazelwood*.

In *Healy*, this Court held only that a state-supported college could not deny a student group (the Students for a Democratic Society) the opportunity to place meeting announcements in the college paper and the use of campus bulletin boards and facilities merely because the college president disagreed with the groups' philosophy and had an unsubstantiated fear of disruption. *Id.* at 187-90. Though petitioners tout *Healy*'s broad general propositions about First Amendment rights (Pet. 12), *Healy* also stressed that "where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" 408 U.S. at 180 (quoting *Tinker*, 393 U.S. at 507). Certainly, *Healy* does not conflict with the Seventh Circuit's holding that a reasonable jury could conclude that *Innovator* was a designated public forum. It also does not conflict with the court's ultimate holding that Dean Carter was entitled to qualified immunity due to disagreement about *Hazelwood*'s applicability to colleges and the "cloudy" record

in this case.

Papish too creates no conflict with the Seventh Circuit's holdings on either the merits or qualified immunity. There, a graduate student was expelled for distributing an off-campus "underground" newspaper, which state university officials previously had allowed to be sold on campus, because it deemed "indecent" the content of a particular issue (a political cartoon of policemen raping the Statute of Liberty and an article containing foul language). 410 U.S. at 670 (distinguishing content-based regulation from reasonable time, place, and manner restrictions on speech and its dissemination). As this Court explained in *Hazelwood*, an off-campus newspaper is merely allowed by a school, and thus is readily distinguishable from a newspaper that is school-sponsored. 484 U.S. at 271 n.3.

Lastly, citing *Healy*, *Papish*, and *Rosenberger*, petitioners posit three arguments for why Dean Carter is not entitled to qualified immunity. Even if Part III of the petition had not argued that confusion exists about the law governing college speech, which mean that this holding was correct, not one of these arguments requires much attention.

The first is petitioners' view that the *Hazelwood* standard must apply only to high schools because this Court has drawn distinction between colleges and high schools in those three cases. Pet. 15-17. As noted above, however, the *Hazelwood* court's explicit reservation of whether the deferential *Hazelwood* standard applies to colleges' non-public forums negates this argument. Next, petitioners argue that under *Healy*, *Papish*, and *Rosenberger*, extracurricular activities are not non-public forums, so all reasonable university officials in Dean Carter's position had to know that *Innovator* was not a non-public forum due to the paper's "undisputed status as a student activity operated apart from the education curriculum and the undisputed record in this case." Pet. 17-19 & n.7. As

the Seventh Circuit's examples demonstrated, however, an extracurricular activity may be a non-public forum. Pet. App. 8a-9a. More important is that, as noted above, *Innovator*'s extracurricular status is *not* "undisputed" – according to petitioner Hosty herself, those who worked on the paper could seek class credit. Doc. 44 at Hosty dep. at 11-14. In their third argument, petitioners summarily assert that because the Seventh Circuit agreed that a reasonable jury could find *Innovator* was a designated public forum, "there is simply no principled basis" for finding that the law was not "clearly established." Pet. 20. As explained above, however, and as petitioners conceded in Part III of the petition, judges continue to disagree about the law even today, thereby demonstrating that Dean Carter was entitled to qualified immunity under the second prong of *Saucier*. *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject [defendants] to money damages for picking the losing side of the controversy.").

In sum, there is no conflict with any ruling by this Court or any circuit that requires this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 05-377

In the
Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE,
AND STEVEN P. BARBA,

Petitioners,

v.

PATRICIA CARTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA

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REPLY BRIEF OF PETITIONERS

1. The Brief in Opposition ("Opposition" or "Opp.") mischaracterizes the record below in several significant respects. First, the record does not support Respondent's contention that, as Dean of Student Affairs and Services at Governors State University, she in fact possessed apparent authority to insist on prior review of the student-operated *Innovator* newspaper as a prerequisite to its continued publication. *See* Opp. at 6. Rather, as the University's president testified, "in no sense" did any faculty member or administrator "have a right to approve" the newspaper's content prior to publication. Dep. of S. Fagan, Aug. 9, 2001, at 58:11-14. *See also* Defendants' Statement of Uncontested Facts, District Court Docket No. 36, ¶ 38 (conceding that University's written policy specified "that the staff [of the student media] will determine content and format of their respective publications without censorship or advance approval") (alteration in original). Second, there is no support in the record for Respondent's suggestion that the *Innovator* may have been published as part of the educational curriculum because academic credit theoretically "*could* be requested as compensation for working on the paper." Opp. at 1 (emphasis added). In fact, it is undisputed that Petitioners neither expected nor received any such credit and, in all respects, student participation on the *Innovator*'s staff was a voluntary, extracurricular activity unconnected to any particular course of study or classroom activity.[1] Third, the

[1] *See* Dep. of M. Hosty, Aug. 2, 2001, at 14:1-13. Such non-grade credit divorced from classroom instruction cannot reasonably be compared to the supervised production of a newspaper within the confines of an academic course of study in any event. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1988) (student newspaper part of

record does not support Respondent's assertion that she was justified in insisting on prior review of the newspaper's content because its full name – "*Innovator, The Newspaper of Governors State University*" – made "eminently reasonable an inference of" University affiliation. Opp. at 17 n.3. It is, however, undisputed that, at all relevant times, the newspaper's masthead explicitly declared that it "is edited and published by the students" and that the "views expressed in" it "may not reflect the views . . . of Governors State University, and should not be regarded as such." Dep. of J. Porche, Aug. 2, 2001, Exh. 3, at 3.[2]

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curriculum where produced in journalism class "taught by a faculty member during regular class hours[,]" where "[s]tudents received grades and academic credit for their performance in the course" and where teacher "'was the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content.'") (citation omitted); *id.* at 271 (School-sponsored speech comprises "expressive activities" that "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, *so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.*") (emphasis added). The newspaper at issue in this case, in contrast, was not produced in connection with any course of instruction supervised by a member of the faculty and exhibited none of the other indicia of a curricular activity – *i.e.*, a designated course number, course description, schedule or registration code, much less a curriculum, syllabus, assignments, grading system, or testing method. In this context, Respondent's suggestion that the *Innovator*'s editors received a stipend paid from student activity fees is of no legal relevance. *See* Opp. at 1. This Court has expressly held that a university that voluntarily creates a system for funding student expression via a student activity fee "may not silence the expression of selected viewpoints" with which it disagrees. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

[2] Respondent's reference to the investigation undertaken by the Illinois College Press Association ("ICPA") is particularly inapposite, *see* Opp. at 2 n.1, since the ICPA expressly determined that *she* had "acted inappropriately, and probably illegally, with blatant disregard for

2. More significantly, Respondent's efforts to recast the record evidence cannot be reconciled with the obligation of the federal courts, on *her* motion for summary judgment, to review that evidence "in the light most favorable to the party opposing" such a motion, *i.e.*, Petitioners. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982). *See also, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 216 (2001) ("[I]f [a qualified immunity claim] turns on which of two conflicting stories best captures what happened ..., [this Court's precedents] will not permit summary judgment in favor of the defendant official. And that is as it should be.") (Ginsburg, J., concurring). In this case, "view[ing] all facts and draw[ing] all reasonable inferences in favor of" Petitioners, *Brosseau v. Haugen*, 125 S. Ct. 596, 597 n.2 (2004), the record on which summary judgment was entered establishes that Respondent imposed a viewpoint-based system of prior restraint on a student newspaper operated separate and apart from the University's curriculum by adult students and that she did so in direct response to the newspaper's criticism of her official conduct.[3]

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students' First Amendment rights" when she instructed "the paper's out-of-town printer . . . not to print any more issues of the Innovator unless she or another administrator had reviewed and approved the content." Dep. of S. Fagan, Aug. 9, 2001, Exh. 6.

[3] Indeed, that record conclusively establishes both that the University had previously and unambiguously ceded unfettered editorial control of the newspaper to its student editors, *see, e.g.*, Defendants' Statement of Uncontested Facts, District Court Docket No. 36, ¶ 38; Dep. of M. Hosty, Aug. 2, 2001, at 151:17-22 (by policy and practice, *Innovator* was "totally student-run"), and that Respondent deviated from that in direct response to published criticism of her official conduct and that of the University, *see* Dep. of J. Porche, Aug. 2, 2001, Exh. 3 (October 31, 2000 issue containing, *inter alia*, two lengthy articles, four letters to the editor, and three columns harshly critical of the University administration, including one column devoted to Respondent's performance, as well as a notice that future issues would contain similar criticism). Not

3. On this record, Respondent's primary submission – *i.e.*, although questions concerning if and how this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), applies in the college setting may be "interesting" and "important," Opp. at 13, this Court should nevertheless deny the Petition because she is entitled to qualified immunity in any event – must be rejected. Petitioners have sued Dean Carter because the conduct in which *she* engaged plainly violated "clearly established" constitutional law. Her argument to the contrary is premised on *her* contention that such misconduct may be excused because "the law governing the applicability of *Hazelwood* to Dean Carter's calls to *Innovator*'s publisher was not 'clearly established' in 2000." Opp. at 10. The issue before this Court, therefore, is precisely whether that contention – that *Hazelwood* rendered it reasonable for a public university administrator to believe that she could impose a system of viewpoint-based censorship on a student newspaper published as an extracurricular activity – can be squared with this Court's precedents construing the First Amendment's application to adult students enrolled in public universities.

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surprisingly, therefore, Respondent concedes that, immediately following the publication of these articles, she "called the [newspaper's] printer and instructed him not to print any more issues of [the] *Innovator* without first calling her so that she or someone from the administration could read and approve it." Opp. at 2. This concession belies Respondent's inaccurate assertion that Petitioner Porche cited another University entity, the Student Communications Media Board (SCMB), as the "'chief deterrent'" to future publication of the *Innovator*. *Id.* at 3 (citation omitted). In fact, Petitioner Porche testified that it was Respondent's demand for prior approval that prevented the newspaper's subsequent publication. *E.g.*, Dep. of J. Porche, Aug. 2, 2001, at 33:1-4 ("Q: Why were you not able to publish ... the papers? A: Because [Dean Carter] called our printer and said not to publish it."). *See also id.* at 60:20-23 ("Q: The SCMB doesn't prevent you from putting the paper together? A: No. . . . ").

4. Respondent is, therefore, incorrect when she asserts that Petitioners have asked this Court to "issue [an] advisory opinion[] or to review dicta," or are merely seeking "advice about the Seventh Circuit's observations concerning if and how *Hazelwood* might apply to a non-public forum." Opp. at 8. Respondent affirmatively invoked *Hazelwood* in the lower courts as *the* reason why she is entitled to qualified immunity. Respondent contends in this Court that *Hazelwood* casts doubt on the ongoing validity of "petitioners' pre-*Hazelwood* authorities." Opp. at 4. And Respondent defends the Seventh Circuit's holding that, even in the context of adjudicating *her* motion for summary judgment, "the implementation of *Hazelwood*" has caused such "legal and factual uncertainties" to "dog the litigation," that she is entitled to immunity. App. 14a; *see also* Opp. at 7. In short, Petitioners seek review of the Seventh Circuit's *ratio decidendi* – *i.e.*, its holding that *Hazelwood* has created sufficient uncertainty in the law that, on the record presented on Respondent's motion for summary judgment, it was objectively reasonable for her to believe that she could censor further criticism of her official conduct by adult students writing in a student newspaper published as an extracurricular activity. *See* App. 7a, 14a-15a.

5. In addition, there is nothing in footnote 7 of this Court's decision in *Hazelwood* that could have, as Respondent asserts, rendered such a belief reasonable. *See* Opp. at 10. Indeed, she expressly concedes that the only question this Court "reserved" in that footnote was whether "post-secondary public school officials may reasonably regulate the content and style of *school-sponsored* speech for *legitimate pedagogical purposes* in a *non-public forum*." *Id.* at i (emphasis added). That question has no bearing on the conduct at issue here – namely, the imposition by a public official of a viewpoint-based system of prior restraint on an

extracurricular student newspaper in retaliation for the newspaper's criticism of her and her colleagues.[4]

6. Respondent further contends that the Petition is "internally, and fatally, inconsistent," Opp. at 8, because it emphasizes that there is presently confusion in the lower courts concerning if and how *Hazelwood* applies to colleges and universities. Opp. at 10. To be sure, there is considerable confusion in the lower courts about *Hazelwood*'s reach and that uncertainty has been materially exacerbated by the Seventh Circuit's decision in this case. Nevertheless, Respondent was not granted immunity because she restricted the content of a newspaper produced in the context of a journalism class (*Hazelwood*), a student thesis produced as a prerequisite to earning a master's degree (*Brown v. Li*, 308 F.3d 939 (9th Cir 2002)), the curricular speech of a student in the classroom (*Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004)), or the speech of a college professor during class instruction (*Bishop v. Aranov*, 926 F.2d 1066 (11th Cir. 1991)). Nor did she receive immunity because – to invoke the example offered by the Seventh Circuit majority – she undertook to control the content of a college alumni

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[4] This Court has held, both before and after *Hazelwood*, that such conduct violates the First Amendment, *see Rosenberger*, 515 U.S. at 835 ("[h]aving offered to [facilitate the expression] of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints"); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that ... First Amendment protections should apply with less force on college campuses than in the community at large."), including specifically in the context of an adult student's contributions to a college newspaper, *see Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973) ("the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech").

magazine bearing the school's imprimatur. App. 8a-9a.[5] The fact that the lower courts are badly divided with respect to the deference owed by the judiciary to educators in such circumstances does not diminish the clarity with which the precedents of this Court and the courts of appeals have heretofore condemned the conduct at issue here. *See* App. 12a (citing *Saucier*, 533 U.S. at 202) (qualified immunity inquiry "must be undertaken in light of the specific context of the case"). Nor does it diminish the need for this Court's guidance now that the Seventh Circuit has added to that confusion by holding that a university administrator could reasonably conclude that she was entitled to *Hazelwood* deference when she set out to censor criticism of her official conduct contained in "an independent publication organized

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[5] It bears emphasis that, despite the confusion in the lower courts regarding the appropriate reach of *Hazelwood* in other such post-secondary school contexts, the Seventh Circuit's decision stands alone in concluding that *Hazelwood* dictates the appropriate standard for examining the constitutionality of restrictions on the extracurricular collegiate press. Indeed, Respondent expressly conceded as much during oral argument before the *en banc* court of appeals. *See* http://www.ca7.uscourts.gov. In this regard, Respondent's reliance on the panel majority's decision in *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd*, 236 F.3d 342 (6th Cir. 2001) (en banc), is misplaced. First, that decision had already been vacated by the Sixth Circuit prior to the Respondent's conduct at issue in this case and was shortly thereafter reversed as plainly "erroneous" in an opinion joined by all but one of that court's 13 judges. *Kincaid v. Gibson*, 236 F.3d 342, 352-53 (6th Cir. 2001). Second, that case did not involve a student-operated newspaper and the Sixth Circuit therefore took great pains to emphasize that its application of forum analysis to the yearbook in question "has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper," *id.* at 348 n.6, an issue the *en banc* court recognized was governed by an imposing body of precedent holding that such conduct violates the First Amendment, *see id.* (citing *inter alia*, *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973)).

and published by students on their own time," not as "part of an academic program, but rather [as] an extracurricular activity." App. 24a (Evans, J., dissenting).

7. On this record, moreover, Respondent's newly framed contention – that she is entitled to qualified immunity because a reasonable college administrator could have concluded that the *Innovator* was a non-public forum, *see* Opp. at 16, 22-23 – cannot be credited. Simply put, there is no legitimate basis for the assertion that a college newspaper published outside the educational curriculum as an independent student activity is anything other than a public forum. Respondent conceded as much below, *see* App. 24a, a concession made necessary both by the record evidence and by this Court's decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 835 (1995). In that case, as Respondent correctly notes, the Court explained that, when the government "'subsidize[s] transmittal of a message it favors,'" the First Amendment permits it to "'take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee' because 'when the State is the speaker, it may make content-based choices.'" Opp. at 18 (quoting *Rosenberger*, 515 U.S. at 833-34). *Rosenberger* does not, however, "support[] the Seventh Circuit's views on government-subsidized speech," Opp. at 18, where, as in this case, the speech at issue is plainly critical of the government itself and the speakers do not purport to do so in the name of that government. *See Rosenberger*, 515 U.S. at 835 ("[h]aving offered to [facilitate the expression] of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints").

8. For that very reason, this case presents an ideal vehicle for the Court to address the First Amendment rights of the student press in the college and university setting. It

not only arises in the context of "criticism of official conduct," speech that goes to the "central meaning of the First Amendment," *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964), it involves "the most serious and the least tolerable infringement of First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), the imposition of a viewpoint-based system of prior restraint on a newspaper as a direct result of such criticism. The Seventh Circuit's holding that Respondent is nevertheless entitled to immunity because her conduct did not violate any "clearly established" rights affords this Court a unique opportunity to counsel both the administrators of public institutions of higher education and the lower courts concerning the First Amendment freedoms afforded the adult students who attend them.

9. Such guidance is especially warranted because the Seventh Circuit's decision has already placed those freedoms in substantial jeopardy. This is not, as Respondent claims, "speculation" that is "premature at best." Opp. at 15. To cite just one example, within ten days of its issuance, the Presidents of all of the schools in the California State University System were advised by their General Counsel that the Seventh Circuit's decision "appears to signal that [public college and university] campuses may have more latitude than previously believed to censor the content of subsidized student newspapers."[6] Petitioners respectfully submit that, especially under these circumstances, this Court should grant their Petition for a Writ of Certiorari.

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[6] Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), available at http://www.splc.org/csu/memo.pdf.

January 17, 2006

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IN THE

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MARGARET L. HOSTY *et al.*,
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PATRICIA CARTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; THE COALITION FOR STUDENT & ACADEMIC RIGHTS; FEMINISTS FOR FREE EXPRESSION; THE FIRST AMENDMENT PROJECT; IFEMINISTS.NET; NATIONAL ASSOCIATION OF SCHOLARS; ACCURACY IN ACADEMIA; LEADERSHIP INSTITUTE; THE INDIVIDUAL RIGHTS FOUNDATION; THE AMERICAN COUNCIL OF TRUSTEES AND ALUMNI; AND STUDENTS FOR ACADEMIC FREEDOM IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 05-377

MARGARET L. HOSTY *et al.*,
Petitioners,

v.

PATRICIA CARTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; THE COALITION FOR STUDENT & ACADEMIC RIGHTS; FEMINISTS FOR FREE EXPRESSION; THE FIRST AMENDMENT PROJECT; IFEMINISTS.NET; NATIONAL ASSOCIATION OF SCHOLARS; ACCURACY IN ACADEMIA; LEADERSHIP INSTITUTE; THE INDIVIDUAL RIGHTS FOUNDATION; THE AMERICAN COUNCIL OF TRUSTEES AND ALUMNI; AND STUDENTS FOR ACADEMIC FREEDOM IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici curiae[1] represent a broad national coalition of groups concerned with free speech and academic freedom on the

[1] A complete list of the *Amici* is set out in Appendix A. Pursuant to S. Ct. R. 37.6, the *Amici* state that no counsel for a party to this action

nation's college and university campuses. For all the reasons stated below *Amici* believe the Seventh Circuit's opinion in *Hosty v. Carter* was wrongly decided and poses a serious threat to universities ability to function as a true "marketplace of ideas."

SUMMARY OF ARGUMENT

The Seventh Circuit's *en banc* decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) is a grave threat to academic free speech and endangers the very existence of independent college media. *Hosty* directly contradicts recent Supreme Court precedent as well as decades of legal decisions protecting free speech on college campuses, and is irreconcilable with fundamental constitutional principles. The decision also conflicts with decades of opinions protecting the student press in other U.S. courts of appeals and opens the door to an unparalleled erosion of college student rights.

In *Hosty*, the Seventh Circuit treated mandatory student fees as a conventional government subsidy that could entitle a public university to control the speech of student fee recipients. This decision is diametrically opposed to this Court's decisions in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Under *Southworth* and *Rosenberger*, student fees are not considered to be part of a university's discretionary funds but rather constitute a pool of student money "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. This decision, however, will force students to pay into a student activities fund earmarked for a student-run newspaper only to have

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authored any portion of this brief *amici curiae* and that no person or entity, other than the *Amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

their fees used to finance an administration mouthpiece. *Hosty* turns what this Court rightly considered student money into governmental money that the government may use to promote its own message and exclude student opinions it dislikes—precisely the opposite of what this Court intended in *Rosenberger* and *Southworth*.

Moreover, the Seventh Circuit erred in applying the standard set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)—a standard formulated for high school students—to adult college students. As the dissenting judges in *Hosty* so compellingly pointed out, in applying *Hazelwood*, the Seventh Circuit ignored both the profound differences between high school students and college students and the distinct missions of high schools and colleges. This Court has long recognized that universities should actively work to *facilitate* free speech and the free exchange of ideas. High schools—for all their many virtues—simply do not have the same historical and societal purpose.

The Seventh Circuit also erred in mechanistically applying forum analysis to a collegiate student newspaper. For decades, the independence of the student media and student groups had largely been presumed by courts. Under *Hosty*, however, once a student publication or student group is deemed to be "subsidized"—a dangerously vague term that could potentially include virtually all collegiate student groups—the administration then has the right to decide whether it is granted public forum or non-public forum status. If the administration designates the group as a non-public forum, the administration may engage even in explicit viewpoint discrimination if that decision is considered "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. This remarkably deferential standard provides all students with precious little, if any, real protection from censorship.

Furthermore, the Seventh Circuit's decision to grant qualified immunity to a public employee who demanded the power of prior restraint over a student newspaper ignores this Court's precedent clearly establishing prior restraint as the most egregious form of censorship the First Amendment exists to prevent.

Finally, outside the world of legal theory, the *Hosty* decision will compound an already existing free speech crisis on America's college campuses. For decades, college administrations have demonstrated a persistent, determined desire to limit free speech and open debate on campus. Hundreds of colleges have enacted speech codes that suppress undeniably protected speech. Universities have abused student fee systems to deny associational rights to disfavored groups, established "free speech zones" and other highly restrictive regulations, and too often have refused to prevent student mob censorship. Fortunately, federal courts and agencies[2] have limited administrative control over free expression to maintain the unique status of college campuses as a "marketplace of ideas." *Hosty* is a step in the opposite direction. It dangerously increases administrative discretionary powers over speech while decreasing administrative accountability.

If allowed to stand, *Hosty* will have numerous, specific, predictable, and far reaching negative consequences for free speech and robust debate on America's college campuses. The *Hosty* decision threatens the very existence of independ-

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[2] *See* First Amendment: Dear Colleague Letter from Gerald A. Reynolds, Assistant Secretary, Office for Civil Rights, U.S. Department of Education (July 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html ("No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights. There is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.")

ent collegiate media as well as the independence of student groups; it re-opens issues relating to collegiate liability for student media and student groups formerly considered settled; and, it allows administrators great freedom to experiment with censorship. Finally, due to the tendency of public college principles to guide private college policies, the threat *Hosty* presents to campus speech will not likely be limited to public campuses. For these reasons, this Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. THE *HOSTY* DECISION DIRECTLY CONTRADICTS SUPREME COURT PRECEDENT, AND IS INCONSISTENT WITH DECADES OF LEGAL DECISIONS PROTECTING FREE SPEECH ON COLLEGE CAMPUSES, AND LONG-ESTABLISHED CONSTITUTIONAL PRINCIPLES.

A. The Seventh Circuit grossly underestimated the special importance this Court has placed on free and open exchange in higher education.

This Court has long emphasized and understood the importance of free and open expression on campus:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

In the nearly fifty years since *Sweezy*, this Court and lower courts have repeatedly reaffirmed the special importance of robust free expression in higher education.[3] In *Healy v. James*, 408 U.S. 169 (1972), this Court made clear that students are an important part of the collegiate marketplace of ideas when it ruled that a college, acting "as the instrumentality of the State, may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent." *Healy* at 187-88. *See also Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'").

The Seventh Circuit, however, held that the rationale of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), applied to collegiate student newspapers. By placing the rights of adult university students, engaged in reporting as part of their extracurricular activities—paid for out of fees extracted from them precisely for this purpose—on the same plane as the rights of high school students writing as part of a journalism class, the Seventh Circuit gravely discounted the

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[3] *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) ("[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses"); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection'") (citations omitted); *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) ("The university environment is the quintessential "marketplace of ideas," which merits full, or indeed heightened, First Amendment protection"); *Linnemeier v. Ind. Univ.—Purdue Univ. Fort Wayne*, 155 F. Supp. 2d 1034, 1042 (N.D. Ind. 2001) ("A university setting is . . . a 'hub of ideas' and a place citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth").

special status of colleges and universities. This Court has rightly never held that the nation relies on its high schools as the engines of intellectual innovation, scientific discovery and open debate, but in opinions like *Sweezy*, this Court has recognized that higher education plays precisely this role. By applying *Hazelwood*'s weak speech protections to adult students and refusing to hold administrators accountable for brazen acts of censorship, the Seventh Circuit opinion threatens the vibrancy and effectiveness of our nation's colleges and universities.

B. The Seventh Circuit mistakenly treated mandatory student activity fees as a conventional government subsidy in conflict with *Southworth* and *Rosenberger*.

The Seventh Circuit directly contradicted Supreme Court precedent by applying doctrines relevant to institutionally "subsidized" speech simply because the *Innovator* (the campus newspaper in question) received funds from the student activity fee, *Hosty*, 412 F.3d at 735. The Seventh Circuit wrongly compared speech in the *Innovator* to other speech "underwritten at public expense," and stated that "[f]reedom of speech does not imply that someone else must pay," to defend the proposition that by granting student activity fees to the paper the university may have attached university control over the paper's views. *Id.* at 735, 737. Under this Court's decisions in *Board of Regents v. Southworth*, 529 U.S. 217 (2000) and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), however, student activity fees are student funds designated to fund student speech and cannot be used by the government to control student speech.

In *Southworth*, when a group of students challenged the use of mandatory student activity fees to fund speech with which they disagreed, this Court explicitly distinguished student activity fees from direct university support, writing that "[i]f

the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. *That is not the case before us*." *Southworth*, 529 U.S. at 229 (emphasis added).

The logic behind the *Southworth* decision is compelling: students should not be forced to subsidize groups or expression they despise. If, however, as this Court explained, mandatory student activity fees are treated as a pool of student money that can only be distributed on a viewpoint-neutral basis, the fee becomes a permissible student fund for free speech in general, not for a certain approved view in particular. *Hosty*, however, treats student activity fees as if they were of the same nature as the direct government funding provided in cases like *Rust v. Sullivan*, 500 U.S. 173 (1991) and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). In cases of direct government funding, the government itself is deemed to be the speaker. However, this Court has made clear that student speech funded by student activity fees "is not that of the University or its agents." *Southworth*, 529 U.S. at 235.

Crucially, the Court held in *Southworth* that student activity fees *must* be distributed without regard to the viewpoint of the student groups receiving those fees. *Southworth*, 529 U.S. at 233. Dean Carter's viewpoint-based decision to prevent the publication of the *Innovator* because it criticized the university administration was not only a violation of GSU's own contractual promises and an impermissible prior restraint on speech, but also directly violated *Southworth*'s requirement of viewpoint neutrality.

Under the logic of *Hosty*, a state university would be responsible for—and theoretically control—the speech of all student fee recipients, including College Republicans, College Democrats, Campus Crusade for Christ, Hillel, Human Rights Campaign, and the Muslim Student Association. Ob-

viously, these groups have competing agendas and ideologies. They do not speak for the university, nor should the university be able to control their speech. However, *Hosty* gives the university just such an opportunity. The entire student fee structure is thus transformed from an engine of free speech into a pretext for institutional control.[4]

C. The Seventh Circuit erroneously applied *Hazelwood* to colleges and universities despite the profound differences in the nature and purpose of high schools and universities.

The most controversial component of the *Hosty* opinion was its decision to apply *Hazelwood* to cases involving the student media at institutions of higher education. The Seventh Circuit decided to apply a standard that ignores the dramatic differences between high school and college students and eviscerates the universally understood status the college student media has enjoyed for decades.

First, as noted above, the Seventh Circuit improperly characterized *Hazelwood* as a case primarily about school-funded speech, whereas this Court's decision in *Hazelwood* was based on far more than the school's mere financial support of the newspaper. This Court was also influenced by the fact that the school administration was sufficiently entangled with the publication of the newspaper—through editorial oversight and a written policy that the newspaper was part of the educational curriculum—that "students, parents, and members of the public might reasonably perceive [it] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. 260, 271 (1988). None of these factors were present with the *Innovator*.

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[4] It is not clear that the university could control the student-run newspaper even if using taxpayer funds; however, this issue is for another time, for in this case the funds were student activity funds assessed against the students.

Second, the *Hosty* court's decision to apply the *Hazelwood* analysis to the paper as soon as it determined the existence of any financial support ignores the relationship between public colleges and the student media that has existed for decades. *See, e.g., Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) ("[a] public university may not constitutionally take adverse action against a student newspaper, such as withdrawing or reducing the paper's funding, because it disapproves of the content of the paper"); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975) ("the right of free speech embodied in the publication of a college student newspaper cannot be controlled except under special circumstances"). The independent student media has long been a collegiate institution, which benefits both students and the colleges themselves.

Third, in applying the *Hazelwood* standard, the Seventh Circuit also ignored the important distinctions between high school and college students. High school students are almost exclusively minors, while college students are almost exclusively adults.[5] *See Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) ("[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community"). *See also Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (holding that *Hazelwood* did not apply to college setting because college students are "young adults"); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) ("few college students are minors, and colleges are traditionally places of virtually unlimited free expression"); *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) ("[c]ollege students today are no longer minors;

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[5] According to the U.S. Census Bureau, only 1.2 percent of undergraduate students are below the age of 18. *See* 2002 U.S. Census Bureau Current Population Survey Report, Table A-6, "Age Distribution of College Students 14 years Old and Over, by Sex: October 1947 to 2002."

they are now regarded as adults in almost every phase of community life"); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) ("[we] do not believe that [a college student] should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education"); *Mazart v. State*, 109 Misc. 2d 1092, 1102, 441 N.Y.S.2d 600, 606-607 (N.Y. Ct. Cl. 1981) ("[i]t is clear from a reading of the published cases dealing with the rights of college students that the courts uniformly regard them as young adults and not children").

Finally, the Seventh Circuit also overlooked the profoundly different missions of high schools and universities. This Court has long recognized the unique status of universities as "vital centers for the Nation's intellectual life. . . ." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). *See also Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[t]he classroom is peculiarly the 'marketplace of ideas.'"). By contrast, this Court has described the status of public secondary schools as follows: "The role and purpose of the American public school system were well described by two historians, who stated: '[Public] education must prepare pupils for citizenship in the Republic. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Bethel Sch. Dist. v. Fraser*, 487 U.S. 675, 681 (1986) (citations omitted).

D. The Seventh Circuit relied on an overly mechanistic application of public forum analysis rather than the longstanding presumption that student media is not merely a public forum, but an independent forum.

After erroneously ruling that *Hazelwood* applied, the court below asked: "was the reporter a speaker in a public forum (no censorship allowed?) or did the University either create a

non-public forum or publish the paper itself (a closed forum where content may be supervised)?" *Hosty*, 412 F.3d at 735-36. This question was improper and serves only to highlight the Seventh Circuit's misunderstanding of the basic purpose and function of the student press.

In many previous cases, the freedom of the student press was simply presumed without the need to conduct a forum analysis.[6] In *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973), the Fourth Circuit gave a clear statement of the traditional standard:

> It may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment.

This understanding is clear from the Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), a case involving a Christian student publication that sought student fee funding. If the receipt of student fees could have converted the publication at issue into a non-public forum, then "viewpoint neutrality" would have been impossible. Administrative editorial decisions follow administrative control, and administrative control would have directly implicated the Establishment Clause. Evangelical Christian publications (such as the magazine at

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[6] *See, e.g., Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) ("[b]ecause of the potentially great social value of a free student voice in an age of student awareness and unrest, it would be inconsistent with basic assumptions of First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate").

issue in *Rosenberger*) may be written, edited, and published by students acting in their private capacity as students, but the state cannot adopt such an explicitly religious point of view.

By stripping the student media of its traditional presumption of independence—or at the very least, the presumption that when a university creates a student newspaper, it is a designated public forum—the Seventh Circuit has introduced dangerous ambiguity to the rights of all student groups engaged in expressive activities.

E. The qualified immunity holding is in direct conflict with Supreme Court precedent clearly establishing prior restraint as the most primitive form of censorship the First Amendment prevents.

In *Hosty*, the Seventh Circuit held that Dean Carter, who had insisted upon prior review of a student newspaper because the administration disliked its viewpoint, enjoyed the protection of qualified immunity. The Seventh Circuit held this despite the fact that the paper's freedom of expression was protected both by the U.S. Constitution and by a contractual promise from the university.[7] The court relied on the following two-factor test from *Saucier v. Katz*, 533 U.S. 194 (2001) to reach this determination: 1) "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [public official's] conduct violated a constitutional right?" and 2) "If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201.

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[7] At the time of the *Hosty* decision, the university's policy was that each funded publication "will determine content and format . . . without censorship or advance approval." *Hosty*, 412 F.3d at 737.

The Seventh Circuit's decision to grant Dean Carter qualified immunity flies in the face of literally hundreds of years of legal scholarship[8] and decades of Supreme Court precedent establishing prior restraint as the most basic form of impermissible censorship.[9] As this Court stated in the context of discussing another student-fee-funded publication, "[t]he first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995). Moreover, Dean Carter's actions as an administrator directly violated this Court's holding in *Kunz v. New York*, 340 U.S. 290, 293 (1950), that a provision "which gives an administrative official discretionary power to control in advance the right of citizens to speak" is "clearly invalid as a prior restraint on the exercise of First Amendment rights."

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[8] *See* William Blackstone, *Commentaries on the Laws of England* (1765-1769); John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644).

[9] *See Near v. Minnesota*, 283 U.S. 697, 718 (1931) ("[t]he fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right"). *See also New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) ("[b]oth the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints"); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity"); *Niemotko v. Maryland*, 340 U.S. 268 (1950) (holding that prior restraints on speech violate the First and Fourteenth Amendments); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938) ("[w]hile this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of constitutional provision").

The Seventh Circuit held that *Hazelwood* and a small number of lower court decisions obscured whether or not Dean Carter could have known she was acting improperly. However, as Judge Evans stated in his dissent in *Hosty*, "[p]rior to *Hazelwood*, courts were consistently clear that university administrators could not require prior review of student media or otherwise censor student newspapers . . . *Hazelwood* did not change this well-established rule." *Hosty*, 412 F.3d at 742. The majority cited no cases implying that Dean Carter might have the power of prior restraint over a student newspaper merely because the paper received mandatory student activity fees assessed to and paid by the students. In fact, the case law regarding prior review of college student media clearly establish that this is not the case.[10] *Hazelwood* was not generally understood to apply to collegiate student newspapers; an examination of William A. Kaplin and Barbara A. Lee's *The Law of Higher Education*, which is perhaps the most comprehensive text dealing with higher education law,[11] does not even mention *Hazelwood* as a case that is applicable to the collegiate student press.[12] However, Kaplin

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[10] *See, e.g.*, *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970) (holding that state university could not require prior review of student newspaper funded by student fees); *Mazart v. State*, 109 Misc. 2d 1092, 1099, 441 N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981) ("censorship or prior restraint of constitutionally protected expression in student publications at State-supported institutions has been uniformly proscribed by the courts").

[11] *See, e.g.*, Karl F. Brevitz, *Legal Resources for Higher Education Administrators and Faculty*, Change Mag., May-June 2003 ("Without question the most comprehensive resource on higher education law is this 1,023-page treatise by William A. Kaplin.. and Barbara A. Lee. . . . This book is used not only as a resource by college and university attorneys and administrators but also serves as one of the two primary texts used in the teaching of higher education law in law schools and schools of education").

[12] William A. Kaplin & Barbara A. Lee, *The Law of Higher Education* 538-549 (3d ed. 1995).

and Lee do mention that "[a]s perhaps the most staunchly guarded of all First Amendment rights, the right to a free press protects student publications from virtually all encroachments on their editorial prerogatives by public institutions." *Id.* at 539.

Simply put, if a state official imposing prior restraint over a collegiate student newspaper flatly because the administration disliked the paper's viewpoint does not constitute a clear violation of established law regarding freedom of expression, no restriction on freedom of expression does. The Seventh Circuit itself may have obscured the constitutionality of Dean Carter's actions by its opinion in this case, but at the time Dean Carter demanded prior restraint over the *Innovator*, the violation was or at least should have been perfectly clear to anyone in her position.

II. THERE IS ALREADY A FREE SPEECH CRISIS ON AMERICA'S COLLEGE CAMPUSES AND, IF ALLOWED TO STAND, THE *HOSTY V. CARTER* DECISION WILL SERIOUSLY EXACERBATE THE EXISTING PROBLEM.

Commentators from across the political spectrum, while often disagreeing on the source, the scale, and the cause of the chilling of free speech on campus, have described the current campus environment as one where the "marketplace of ideas" is under siege.[13] Whether in the name of "toler-

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[13] *See* Forum, *A Chilly Climate on the Campuses*, Chron. Higher Educ. (Wash., D.C.), Sept. 9, 2005, at B7 ("Rarely has the climate on college campuses seemed such a cause for concern . . . What is notable is not that so many people are talking about a big chill, but that so many different people—representing very different perspectives—are doing so"). The Chronicle forum included essays from leading commentators on campus freedom including Robert O'Neil, Stanley Kurtz, Jonathan Cole, Chon Noriega, Ellen Willis, and Amy Gutmann discussing the campus chill on free speech from a multitude of perspectives.

ance," risk management, or merely peace and quiet, hundreds (if not thousands) of universities have enacted policies and engaged in practices hostile to free and open discourse over the past few decades.[14] Starting in the 1980s, colleges enacted "speech codes" under a variety of creative legal theories. Despite numerous decisions ruling these codes unconstitutional[15] and this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which indicated that viewpoint-based speech codes would be unconstitutional, the number of university speech codes actually increased through the 1990s, *see* Jon Gould, *The Precedent that Wasn't*, 35 Law & Soc'y Rev. 345 (2001). Over the past twenty years, numerous books have been written alleging an illiberal, intolerant, and/or partisan atmosphere on campus[16] in which dissenting viewpoints and unpopular groups are repressed through a variety of measures. More recently, universities have adopted highly restrictive, and sometimes absurd "speech

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[14] For examples of these policies and practices, see the Foundation for Individual Rights in Education's database of restrictive campus speech codes at www.thefire.org/spotlight. The website is constantly being updated, and currently includes 421 institutions and links directly to thousands of primary documents, including universities' actual policies, statements and handbooks.

[15] *See, e.g.*, *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *Dambrot v. Central Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993); *The UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

[16] *See, e.g.*, David E. Bernstein, *You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003); Donald Alexander Downs, *Restoring Free Speech and Liberty on Campus* (2004); Alan Charles Kors & Harvey A. Silverglate, *The Shadow University: The Betrayal Of Liberty On America's Campuses* (1998).

zone" policies restricting speech from all but small corners of the university.[17]

Thus far, the law has served to protect the collegiate marketplace of ideas from overreaching administrations, requiring policies and practices in keeping with the First Amendment and academic freedom. For example, in *Rosenberger*, this Court granted religious student groups equal access to student fee funding. In *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003), a federal court in Pennsylvania ruled Shippensburg University's speech code was unconstitutionally overbroad, and in *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004), a federal court in Texas dismissed a speech zone policy as unconstitutionally overbroad.

The *Hosty* decision, however, is a step in the opposite direction. College administrators have already demonstrated a tenacious will to censor even when the law clearly limited their ability to do so. The legal ambiguity that *Hosty* creates, the unparalleled discretion it grants college administrators, and the legal protection it provides to administrators who censor all threaten to dramatically worsen the campus free speech crisis.

If allowed to stand, *Hosty* will have numerous, specific, predictable, and far reaching negative consequences for free speech and robust debate on America's college campuses. It is no exaggeration to say that the *Hosty* opinion threatens the existence of the independent collegiate media. Universities have not shown great tolerance for the free press. If there is no longer a presumption of independence or of public forum status when a public university establishes a student news-

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[17] *See generally* Mary Beth Marklein, *Students are Giving Colleges a Lesson in Free Speech*, USA Today, May 19, 2003; David L. Hudson Jr., *Free Speech Zones*, *available at* http://www.firstamendmentcenter.org/speech/pubcollege/topic.aspx?topic=free-speech_zones.

paper, there should be no doubt that administrators who wish to censor will take advantage of this ambiguity. Public universities will be able to argue that any paper that receives any kind of benefit—whether financial support or simply the use of office space—from the university is subject to administrative control. If past experience is any guide, colleges will pay lip service to the importance of student press freedom, but they will quickly take advantage of any legal means available to punish or control student newspapers that anger or offend students or administrators. For example, in a memorandum to all California State University presidents written only ten days after the *Hosty* decision, California State University General Counsel Christine Helwick wrote that:

> [w]hile the Hosty decision is from another jurisdiction and, as such, does not directly impact the CSU, the case appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers, provided that there is an established practice of regularized content review and approval for pedagogical purposes.[18]

In this same way, *Hosty* threatens the existence of independent student groups. If the primary question under *Hosty* is whether a student group is in some way "subsidized," any group that receives any sort of benefit or student fees could be threatened with administrative control. The possibility that a court might later determine that the student group or publication was entitled to some form of public forum status would hardly protect the overwhelming majority of these groups that are neither willing nor affluent enough to mount a legal defense.

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[18] Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005), *available at* http://www.splc.org/csu/memo.pdf.

This case also re-opens issues relating to collegiate liability for student media and student groups formerly considered settled. It also allows administrators virtually unlimited freedom to experiment with censorship above and beyond even the broad discretion granted to them under *Hosty*. Finally, there is no reason to believe this holding will remain limited to public colleges—private colleges that promise free speech to their students tend to base their own speech policies on First Amendment standards.[19] *Hosty v. Carter* will have reverberations from the community college to the Ivy League. Administrators will impose the "intellectual strait jacket" that this Court has long feared, and the consequences will be profound. As FIRE co-founder Alan Charles Kors once said, "A nation that does not educate in freedom will not survive in freedom, and will not even know when it is lost."[20]

CONCLUSION

For all of the reasons stated above we ask that the Supreme Court grant the writ of certiorari.

Respectfully submitted,

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[19] Kaplin and Lee even suggest "private institutions may want to adhere to much the same guidelines for promulgating rules as are suggested for public institutions, despite the fact they are not required to do so by law." Kaplin and Lee, *supra* note 12, at 464-465.

[20] Alan Charles Kors, Keynote Address to Phi Beta Kappa of Delaware County, (Oct. 13, 2004).

APPENDIX

APPENDIX

LIST OF PARTIES TO BRIEF *AMICI CURIAE*

The Foundation for Individual Rights in Education, Inc. ("FIRE"), is a non-profit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code, interested in promoting and protecting academic freedom and First Amendment rights at American institutions of higher education. FIRE receives hundreds of complaints each year concerning attempts by college administrators to justify punishing student expression through misinterpretations of existing law. FIRE believes that, for academic freedom and robust collegiate expression to survive, the law must remain clearly and vigorously on the side of free speech on campus.

The Coalition for Student & Academic Rights ("CO-STAR") is a national network of lawyers that helps college students and professors with their legal problems. CO-STAR offers a wide range of services, including legal counseling, mediation, legal education and advocacy. CO-STAR is based in Bucks County, Pennsylvania and is a 501(c)(3) corporation.

Feminists for Free Expression (FFE) is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce expressive materials free from government intervention. Originally organized in 1992 in response to the many efforts to solve society's problems by book, music or movie banning, FFE provides a leading voice opposing state and national legislation that threatens free speech; defends the right to free expression in court cases, including those before the Supreme Court; supports the rights of artists whose works have been suppressed or censored and provides expert speak-

ers to universities, law schools and the media throughout the country.

The First Amendment Project is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

Ifeminists.net (a site for individualist feminism) is one of the longest-standing feminist sites on the Internet—which challenges many of the ideological assumptions that are common on campus today, especially in Women's Studies Departments. Indeed, many of our subscribers are university students. If the debate and dialogue upon which intellectual growth depends is to occur, then it is essential that student publications be allowed freedom of speech and not be censored by university authorities who may have a vested interest in the status quo. Ifeminists believes that the decision reached by the Seventh Circuit Court of Appeals in *Hosty v. Carter* will lead to unconstitutional censorship of student journalism and, therefore, hopes the Court will intervene to overturn this dangerous precedent.

The National Association of Scholars is an organization of professors, graduate students, college administrators, trustees, and independent scholars, committed to rational discourse as the foundation of academic life in a free and democratic society.

The Leadership Institute identifies, recruits, trains, and places conservatives in the public policy process. The Institute's Campus Leadership Program launches and maintains independent conservative groups and newspapers at colleges and universities nationwide, and works with over 300 now-active organizations on campuses in all 50 states. Independence and freedom of expression are essential to these

organizations, as they commonly face attempts at administrative censorship.

Accuracy in Academia, a non-profit research group based in Washington, D.C., wants colleges and universities to return to their traditional mission—the quest for truth. To this end, AIA focuses on the use of classroom and/or university resources to indoctrinate students; discrimination against students, faculty or administrators based on political or academic beliefs; and campus violations of free speech. AIA publishes in its monthly newsletter, Campus Report, and posts on its websites, www.academia.org and www.campusreportonline.net, hundreds of stories each year that present the evidence behind these complaints.

The Individual Rights Foundation ("IRF") litigates civil rights and First Amendment issues and educates the public about the importance of the First Amendment's free speech and associational guarantees. Founded in 1993, the IRF is a nonprofit organization that represents parties to litigation and files amicus curiae briefs involving significant civil rights and First Amendment issues. The IRF is committed to the principle of equality of rights for all persons, and to the goal of protecting fundamental civil rights and First Amendment rights.

Students for Academic Freedom ("SAF") is a national coalition of independent campus groups dedicated to restoring academic freedom and educational values to America's institutions of higher learning. SAF is committed to the goal of promoting intellectual diversity at colleges and universities. SAF seeks to secure greater representation for underrepresented ideas and to promote intellectual fairness and inclusion in all aspects of the curriculum and the campus public square.

The American Council of Trustees and Alumni (ACTA) is a 501(c)(3), tax-exempt, nonprofit, educational organization

committed to academic freedom, excellence and accountability at America's colleges and universities. ACTA works with college and university trustees to safeguard the free exchange of ideas, support liberal arts education, uphold high academic standards, and ensure that the next generation receives an open-minded, high quality education at an affordable price. ACTA has members from over 400 colleges and universities. Its quarterly publication, *Inside Academe*, goes to over 12,000 readers, including 3,500+ college and university trustees.

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IN THE

Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA,

Petitioners,

v.

PATRICIA CARTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE ASSOCIATION FOR EDUCATION IN JOURNALISM AND MASS COMMUNICATION AND THE ASSOCIATION OF SCHOOLS OF JOURNALISM AND MASS COMMUNICATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The Association for Education in Journalism and Mass Communication, the Association of Schools of Journalism and Mass Communication, the Northwestern University Medill School of Journalism, the Pennsylvania Center for the First Amendment, the Pennsylvania State University College of Communications, the Thomas Jefferson Center for Free Expression, the University of Georgia Henry W. Grady College of Journalism and Mass Communication, the University of Missouri School of Journalism, the Annenberg School for Communication of the University of Pennsylvania, and the S.I. Newhouse School of Public Communications at Syracuse University respectfully submit this brief as *amici curiae* supporting Petitioners Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba.[1] The parties have consented to the filing of this brief, and letters indicating their assent have been submitted with this brief.

INTEREST OF THE *AMICI CURIAE*

The *amici* are associations of professors and leaders of journalism and mass communications schools and departments, as well as university journalism schools and centers for the study of the First Amendment. *Amici* have a strong interest in the aplication of the First Amendment to student newspapers at colleges and universities. Collectively, *amici* have broad and deep expertise in teaching journalism at the college level. As university educators, *amici* are qualified to address the pedagogical purposes served by uncensored college

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[1] Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

newspapers. *Amici* also are knowledgeable about the role that campus newspapers play in their communities and how best to prepare their students to become professional journalists.

The Association for Education in Journalism and Mass Communication has a membership of about 3,400. Of these, more than 3,000 teach and conduct research at United States universities and colleges. The AEJMC Constitution states that the association will improve education in journalism and mass communication by "supporting freedom of communication consonant with the ideal expressed in the First Amendment to the U.S. Constitution." Freedom of expression at university and college student publications is important to AEJMC members because many work with student journalists in classrooms and as advisers to student publications.

The Association of Schools of Journalism and Mass Communication is a national organization of nearly 200 leaders, including deans, directors, and chairs of departments, schools and colleges that graduate the majority of new journalists in the United States from their professional degree programs. The association supports freedom of expression for everyone, and especially for student journalists, at college and university newspapers, yearbooks and magazines at all institutions throughout the nation.

Founded in 1921, Northwestern University's Medill School of Journalism is both an undergraduate and graduate program whose mission is to provide rigorous professional education and training for a full range of positions in news, information and commercial communications, to lead thought in the field of journalism and to assist its students in finding employment. The school, comprising nearly 700 undergraduate journalism students, more than 150 graduate students in journalism, and another 80 studying integrated marketing

communications, enhances student knowledge of the environment of journalism, media ethics and the role of the media in a diverse society. Medill has 46 full-time faculty, teaching facilities in Evanston, Chicago and Washington, and a global program that each year trains 40 graduate journalism students abroad.

Penn State's College of Communications, which enrolls more than 3,300 undergraduate majors and 80 master's and doctoral students, is the largest nationally-accredited program of its kind in the country. The university offered its first journalism writing course in 1911. The Department of Journalism was established in 1929 and was in the initial group of institutions nationally accredited in 1948. In 1985, the School of Communications was formed, bringing together existing programs in journalism, advertising, public relations, telecommunications, media studies and film. Communications achieved college status in 1995. The College strives to educate students for citizenship in a society in which communication and information are major commodities and the basis of the democratic process. The College's 62-person full-time faculty is noted for its strong blend of professional and academic backgrounds and is dedicated to integrated excellence in teaching, research and outreach. The College boasts a strong array of special programs, including the Washington, D.C., Communications and Democracy Semester, the Foster Conference of Distinguished Writers and several endowed lecture series, many of which focus on ethics, social responsibility and freedom of expression. Penn State students participate in a variety of on-campus media opportunities by working at the century-old Daily Collegian, an independent newspaper with a 17,000 daily circulation; at ComRadio, a Webcasting station with a news and sports format; and on a weekly 30-minute student television news show that is aired on Penn State's public broadcasting station. Each year, nearly 500

Communications students enroll in for-credit off-campus internships across the country and abroad.

In February 1992, Penn State established the Pennsylvania Center for the First Amendment to promote awareness and understanding of the principles of free expression to the scholarly community and the general public. The Center's goals support Penn State's outreach mission of providing the commonwealth and the nation with education, research and service. The Center carries out numerous projects designed to accomplish its mission. Faculty members involved in the enterprise have published books and articles on First Amendment topics. Numerous op-ed pieces have appeared in the nation's most-respected newspapers. The Center's members regularly provide commentary to newspapers and magazines and on radio and television programs as well as give speeches to organizations that wish to learn more about First Amendment freedoms. Additionally, the Center serves as a media resource, providing assistance on access issues and related topics. It further provides expert testimony to courts and legislative bodies grappling with First Amendment issues. The Center gives students the opportunity to engage in research projects under the supervision of its co-directors. The Pennsylvania Center for the First Amendment, which is housed in the College of Communications, is co-directed by attorneys Robert D. Richards and Clay Calvert.

The Thomas Jefferson Center for the Protection of Free Expression, located in Charlottesville, Virginia, is a nonprofit, nonpartisan institution dedicated solely to the protection of the First Amendment rights of free speech and free press. For more than ten years the Center has participated actively in the litigation of First Amendment issues and has filed briefs *amicus curiae* in federal and state courts, including this Court. Many of those cases involved questions of academic freedom and free speech within the academic community.

The Grady College at the University of Georgia is one of the oldest and most distinguished communication programs in the country. Its three departments – journalism, telecommunications, and advertising and public relations – are consistently ranked among the very best in the nation. Our focus on providing the highest possible quality of education drives the Grady College's success and the success of its alumni. It is our privilege to prepare the next generation of leaders in journalism and communication, and it is our commitment to emphasize education rather than to simply provide training. The distinguished faculty is critical to the success of our mission. Not only do they provide students with the best in professional training, they also instill within them a sound understanding of the duties, responsibilities and obligations they will have as future journalists and communication professionals within a democracy. The Grady College is home to the Peabody Awards, internationally recognized as one of the most prestigious awards for excellence in electronic media.

The University of Missouri School of Journalism is the world's first journalism school, founded by Walter Williams in 1908. Williams, the first dean of the school and later the president of the University of Missouri, believed that journalism education should be professionalized and provided at a university. Today, the Missouri School of Journalism consistently ranks at the top of professional surveys of journalism schools. At Missouri, real-world media experience is part of the curriculum. The Missouri School of Journalism educates students for careers in journalism, advertising and other media fields by combining a strong liberal arts education with unique hands-on training in professional media. The School publishes the Columbia Missourian, the weekly morning newspaper for the Columbia region, Adelante, a bilingual monthly newsmagazine, Vox magazine and the Global Journalist. It also operates Station KBIA(FM),

one of the most successful noncommercial radio stations in the country, Station KOMU(TV), the Columbia NBC affiliate, the only university-owned commercial television station in the United States that uses its newsroom as a working lab for students, and Missouri Digital News, an Internet-based news service

When publisher, diplomat and philanthropist Walter Annenberg announced the founding of the Annenberg School for Communication (ASC) at the University of Pennsylvania in 1958, he described its purpose with the following words:

> Every human advancement or reversal can be understood through communication. The right to free communication carries with it responsibility to respect the dignity of others – and this must be recognized as irreversible. Educating students to effectively communicate this message and to be of service to all people is the enduring mission of this school.

Over the ensuing 45 years, ASC has attempted to remain true to this mission, while also adjusting to changes affecting the School, the University and the larger educational, scholarly and professional environments. In ASC's current incarnation it does so through an emphasis on four central goals. First, producing and disseminating cutting-edge scholarly research designed to advance the field's theoretical and empirical understanding of the role of communication in public and private life. Second, producing high-quality applied research designed to advance the public's understanding and effective use of communication (from face-to-face conversations to mass media), and policy-makers' ability to create a media environment that fosters the personal and collective development of its citizens. Third, providing a first-class liberal arts education to

undergraduates, designed to help make them better consumers and producers of public information, strengthening their understanding of the role of communication in their personal, professional and civic lives, and preparing them for private and public-sector leadership positions in communication-related fields. And fourth, educating Ph.D. graduate students in the theories, substance and methods of communication research and placing them in leading academic and professional positions in the field.

The S.I. Newhouse School of Public Communications at Syracuse University is one of the nation's premier schools of mass communication. The Newhouse school, which traces its roots to Syracuse University's School of Journalism (founded in 1934), embraces virtually every known form of information dissemination from print journalism to broadcast journalism to online communication and from advertising and public relations to photography and film. The more than 60 faculty members come primarily from the profession, men and women for whom teaching is the top priority. Among them are international experts in such fields as First Amendment law, the effects of television on children, the impact of television on popular culture, and the effectiveness of advertising. The mission of the Newhouse School is to prepare students for productive and rewarding careers in public communications while at the same time educating them about the societal roles and obligations of their respective fields. Today the School offers majors in photography, graphics, magazine journalism, broadcast journalism, public relations, advertising, and television-radio-film as well as its original focus, newspaper journalism. It is also the site of several research centers dedicated to the study of communication.

SUMMARY OF THE ARGUMENT

Studies of high school, college, and professional news media demonstrate the vital importance of uncensored campus newspapers. Research shows that experience in reporting for and editing a campus newspaper provides a unique opportunity for college journalists to develop an understanding of the role of the press. This experience is critical in developing a commitment to the field of journalism as a career, and in acquiring the skills that newspapers find valuable.

Permitting college administrators to censor campus newspapers undermines the goal of encouraging students to mature as journalists and prevents them from learning that they are responsible for what they publish. This Court's decisions on campus freedom of the press support the conclusion that such censorship violates the First Amendment. Permitting a system of prior restraint, as in this case, harms the interests of campus and local readers in seeking relevant and critical coverage of issues in their community, including the administration of the local university. The Seventh Circuit's decision also poses a threat to academic freedom and the exercise of First Amendment rights by faculty members.

ARGUMENT

An official at a public university imposed a system of prior restraint on the publication of petitioners' newspaper. The Seventh Circuit's decision upholding the official's action, if not corrected, will have a chilling effect on the exercise of First Amendment rights by journalists and faculty at public colleges and universities. It will also have a potentially devastating impact on the recruitment and training of tomorrow's professional journalists.

1. This Court has recognized that the First Amendment applies to students at public universities and

colleges. *Healy v. James*, 408 U.S. 169, 182 (1972). The Court has extended First Amendment protection to students working on college newspapers. *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667 (1973).

Ten years ago, the Court made clear that university officials violate the First Amendment when they impose viewpoint-based discrimination on funding decisions for student newspapers. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). The Court distinguished cases in which the university was paying for an agent to promote the university's message from cases in which the university was facilitating the speech of student groups. *Id.* at 834. "Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints." *Id.* at 835.

The Seventh Circuit's decision permits a public official to stop publication of a student newspaper on the basis of objections to its contents in direct contravention of the principles articulated in *Rosenberger* and its predecessors. The Court should grant certiorari in order to reaffirm the First Amendment rights of college journalists as well as to protect the interests of faculty members and the readership of campus newspapers. The Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), does not and should not be applied at the university level. *See Hazelwood*, 484 U.S. at 273 n.7 (explicitly noting that the Court's decision does not extend to the college and university level).

2. An uncensored college newspaper is vitally important to attracting college students to journalism and providing them with a real-world training ground that prepares them to become professional journalists. The skills that journalists acquire while working at a college newspaper are fundamental to their development into

professionals who are able to make editorial decisions, take responsibility for the stories that are published – and those that are not – and gather and write about the events of the day in an objective manner.

The reporters and editors working on a campus paper learn valuable lessons that prepare them for a career in journalism. Prior experience in journalism is one of the most important factors considered by both small and large newspapers in hiring new reporters. Barbara J. Hipsman & Stanley T. Wearden, *Skills Testing at American Newspapers* 13-14 (Aug. 1989) (paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication, Newspaper Division). More than three quarters of newspapers test for writing skills before hiring journalists. *Id.* at 11. In addition to prior journalism experience and writing skills, general reporting ability ranked very high among skills that newspapers listed as most desirable in new hires. *Id.* at 13.

College students acquire more than writing and reporting skills when they work for a campus newspaper. They also learn that they are responsible for what appears on the pages of their publication. For this reason, it has been argued that "the student publication offers the single best avenue for training – superior even to the journalism school ... for a career in professional journalism." Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College Hazelwood" Case*, 68 Tenn. L. Rev. 481, 482 (2001). This vital experience cannot be acquired at newspapers whose content is controlled by university officials.

Professor Peltz observes that the consequences of applying *Hazelwood* to university journalists would extend "outside the ivy-covered walls. Imagine a generation of college-trained journalists with no practical

experience handling controversial subject matter, nor with any more than an academic understanding of the role of the Fourth Estate in American society." *Id.*

Early exposure to and experience in a realistic journalistic setting is important not only for the training that it provides, but also for the effect that it has on the student reporters' ability to think critically about the proper role and methods of the press. Research demonstrates that early participation on student newspapers influences student journalists' attitudes towards the press and likelihood of committing to a career in journalism. Student reporters with experience working in newsroom become more like professional journalists when asked about their views on civic journalism and on the practices of the news media generally. Michael McDevitt *et al.*, *The Making and Unmaking of Civic Journalists: Influences of Professional Socialization*, 79 Journalism & Mass Commc'n Q. 87, 95-96 (2002). "One experience in particular – working for the campus paper – appears to instill a sense of autonomy" in student journalists. *Id.* at 98. *See also* Jennifer Rauch *et al.*, *Clinging to Tradition, Welcoming Civic Solutions: A Survey of College Students' Attitudes toward Civic Journalism*, 58 Journalism & Mass Commc'n Educator 175, 183-84 (2003).

Research also suggests that "the earlier one decides on journalism as a career, the greater the commitment later on." Wilson Lowrey & Lee B. Becker, *Commitment to Journalistic Work: Do High School and College Activities Matter?*, 81 Journalism & Mass Commc'n Q. 528, 538 (2004). *See also id.* at 539 (noting that an important predictor of the choice to become a journalist is college-level socialization, and that experience with campus media significantly enhances the probability of pursuing a career in journalism).

Extending this Court's holding in *Hazelwood* to college level newspapers would defeat these goals. If university administrators can impose prior restraints on campus newspapers, college journalists will fail to learn the importance of autonomy and professional responsibility because they will be neither autonomous nor responsible. Peltz, 68 Tenn. L. Rev. at 549 ("practical experience with editorial freedom and responsibility is an essential component of an education in journalism"). Not only would college journalists fail to get real-world experience in making and taking responsibility for editorial decisions, they also would not be free to take initiative in reporting because of the chilling effect of the administration's censors.

The threat of censorship of campus papers is not only real, it is growing. Michael W. Hirschorn, *University Efforts to Censor Newspapers Are on the Increase, Student Editors Say*, 33 Chronicle of Higher Educ. at 35-37 (1987). Studies show that high school newspapers suffered a severe chilling effect after *Hazelwood*, avoiding coverage of controversial issues. Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After* Hazelwood School District v. Kuhlmeier: *A Content Analysis Case Study*, 29 J. of Law & Educ. 463 (2000); *see also id.* at 473 (finding that students began to self-censor criticism in their publications, eliminating two thirds of the pre-*Hazelwood* levels of critical commentary). Three-fourths of high school principals and advisors acknowledge censoring their schools' newspapers. Lillian Lodge Kopenhaver and J. William Click, *High School Newspapers Still Censored Thirty Years After* Tinker, 78 Journalism & Mass Commc'n Q. 321, 327 (2001). More than a decade after the Court announced its opinion in *Hazelwood*, high school "journalists appear unwilling to oppose the administration in their commentary." Lomicky, 29 J. of Law & Educ. at 471.

A *Hazelwood* regime applied to university students risks turning college newspapers into the timid house organs that most high school newspapers have become. *Id.* at 329. Research shows that 87 percent of high school principals believe that the student newspaper should advance the public relations objectives of the school. *Id.* Half of them disagree with the statement that the newspaper should print a factually accurate story if the publication will embarrass the school's administration. *Id.* Such publications would give college students little incentive or ability to gain the real-world journalism experience that studies show is so crucial in acquiring the skills and commitment necessary for training tomorrow's reporters.

3. The Seventh Circuit's application of *Hazelwood* to campus newspapers will expand the censorship trends identified above to college campuses. *See generally* Lomicky, 29 J. of Law & Educ. at 463-76; *see also* Peltz, 68 Tenn. L. Rev. at 496 (noting that high school students and their advisors self-censored coverage of controversial topics after *Hazelwood*). Yet *Hazelwood* did not alter the regime of *Healy* and *Papish*, and confirms that college-level journalists and newspapers are entitled to the First Amendment rights guaranteed to the professional press.

The Seventh Circuit's application of *Hazelwood* to the university press was erroneous for three reasons: (i) high-school students are younger than college students, and the Court has often found youth to be an important factor in determining the application of Constitutional rights; (ii) the high-school newspaper in *Hazelwood* was part of a classroom curriculum, while the newspaper in this case was not; and (iii) the mission of public universities and the role that they play are different from that of high schools.

First, the Court should grant certiorari in order to correct the Seventh Circuit's error in applying *Hazelwood*, a high-school press freedoms case, to adults. One of the chief rationales the Court offered in *Hazelwood* for permitting educators to control student publications was that the officials needed to be able to "take into account the emotional maturity of the intended audience...." *Hazelwood*, 484 U.S. at 272 (citing such "potentially sensitive topics" as the existence of Santa Claus and discussions of teenage sexual activity). *Compare Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that "[u]niversity students are, of course, young adults. They are less impressionable than younger students...."). *See also Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (noting the "skepticism of the college student").

The First Amendment rights of children have been limited in recognition of the importance of protecting them from exposure to material that is deemed inappropriate for an immature audience. *Hazelwood*, 484 U.S. at 272; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (sustaining high school's punishment of student for vulgar speech); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (affirming sanctions for "dirty words" broadcast); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding prohibition on sale of obscenity to minors); *Bellotti v. Baird*, 443 U.S. 622, 636-637 (1979) (discussing the Court's jurisprudence limiting children's First Amendment rights, citing immaturity). These cases, however, provide no basis for departing from traditional First Amendment principles when the relevant writers and readers are adults. Only one percent of the students enrolled in American colleges and universities are under the age of 18. U.S. Census Bureau Survey, Table A-6, Age Distribution of College Students 14 Years Old and Over, by Sex: October 1947 to 2002, *available at* http://www.census.gov/population/socdemo/school/tabA-6.xls (last viewed October 13, 2005).

Second, the pedagogical reasons for official control of the student press do not apply when the newspaper is not part of any class but is instead an autonomous extracurricular activity. When student-published newspapers are produced in a classroom setting, as part of the curriculum and for academic credit, the Court has recognized that the school should be able to exercise supervisory control over the classroom activity. *Hazelwood*, 484 U.S. at 268-69; *cf. Brown v. Li*, 308 F.3d 939, 949-50 (9th Cir. 2002) (noting that *Hazelwood* applies to core curricular speech, but does not apply to student extracurricular speech, including newspapers). Conversely, when campus newspapers are not part of a classroom exercise, suggestions of pedagogical justification for censorship is unpersuasive. *See Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Massachusetts*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (rejecting the application of *Hazelwood* to college newspapers); *see also Kincaid v. Gibson*, 236 F.3d 342, 346 n.5 (6th Cir. 2001) (en banc) (noting that "*Hazelwood* has little application" to case involving university officials' confiscation of yearbooks in violation of the First Amendment). "[I]f a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment." *Joyner v. Whiting*, 77 F.2d 456, 460 (4th Cir. 1973).

Here, the University's President and the Dean of the College complained that the newspaper had published articles that were "irresponsible" and "defamatory." *See* Pet. 5. The president rebuked the publication for criticizing him and for allegedly sullying the reputation of the faculty and the school. *Id.* at 5-6. Such complaints are not pedagogical. In any case, "[p]ublic officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to

restrain the publication of newspapers and periodicals." *Near v. Minnesota*, 283 U.S. 697, 718-19 (1931).

Third, the public university's mission is fundamentally different from that of a high school, and the power to censor does not advance its legitimate goals. Censorship of college newspapers "risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger*, 515 U.S. at 836. This Court has observed that:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

Id. at 835.

This distinction explains why the Court's "cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools." *Bd. of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 239 n.4 (2000) (Souter, J., concurring in the judgment) (citations omitted). The "role and purpose" of high schools, in contrast, are to prepare children to become "members of the Republic" by inculcating in them "the habits and manners of civility." *Bethel Sch. Dist.*, 478 U.S. at 681; *see also West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943) (stating that they are "educating the young for citizenship"). The

Court should grant review in order to restore the freedoms that are so central to the flourishing "intellectual and philosophic tradition" at this Nation's colleges and universities.

4. In addition to the real-world training ground that it provides, an uncensored college press is critically important in providing the services that any newspaper provides to its readership, namely news about the community and its public officials. The imposition of prior restraints on the press was anathema to the Framers, and the need for a free press is no less vital or relevant on a college campus than anywhere else. "[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." *Near*, 283 U.S. at 716. Such freedom allows the press to fulfill its role as a "watchdog" that alerts its readers to wrongdoing by officials.

"Clearly the watchdog comprises part of the American tradition of freedom of the press. Judicial recognition of the importance of the press' institutional function is firmly set in First Amendment case law." Timothy W. Gleason, *The Watchdog in Nineteenth Century Libel Law: A Common Law Concept of Freedom of the Press* at 4 (Aug. 1986) (paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication, Law Division). When university reporters turn the spotlight of the press onto campus officials and faculty in order to scrutinize and criticize their actions, they are fulfilling their obligations as journalists and are as worthy of First Amendment protections as their peers at mainstream newsrooms across the country.

The Seventh Circuit's imposition of the *Hazelwood* regime on university journalists will harm college journalists' ability to cover controversial issues, and thus

will handicap their readers' ability to find out about important issues on campus. Currently, college newspapers cover national and international news as well as local issues relevant to the campus community. *See* Peltz, 68 Tenn. L. Rev. at 481-82; Sylvia Spann, *The Student Newspaper in a Study Skills Class*, 18 Teaching English in the Two-Year College 38 (1991); *see also Student Activities Coverage: Mainframe of School Publications*, 21 Commc'n: Journalism Educ. Today vol. 2 (1987) (finding that roughly half of college newspaper coverage is devoted to campus news). College reporters "test the boundaries and look for their own sense of ethical behavior," and are relied upon (and expected to) act as an impetus for campus dialogues. John Jasinski, *As They See It....: College Newspapers May Not Look the Same to Campus Administrators*, 33 College Media Review 8, 11 (1994).

Under the *Hazelwood* regime, campus newspapers will not serve their readers by reporting the undistorted news. University officials will subject the campus newspapers to overt forms of censorship. Peltz, 68 Tenn. L. Rev. at 497-98 (citing examples of the "censorship tsunami" that swept across high schools after *Hazelwood*). And campus newspapers will frequently engage in self-censorship. *See* Lomicky, 29 J. of Law & Educ. at 473 (concluding that after *Hazelwood*, many high school newspapers engaged in self-censorship).

When college reporters criticize faculty and school officials, they are sometimes able to spur reform. Such criticism undoubtedly is the reason why some university officials are eager to have the power to censor such coverage, but it is not a valid justification for abridging campus freedom of speech and of the press. Under the *Hazelwood* regime, college journalists "could become increasingly complacent, unwilling to go after controversial stories in the student newspaper and unwilling to tackle controversial subjects and events...."

Peltz, 68 Tenn. L. Rev. at 534. Without such experience during college, it would be less likely "that the same college editor as a professional journalist would aggressively pursue" similarly controversial stories regarding government officials. *Id.* at 535.

5. The logic of the Seventh Circuit's opinion is not confined to student newspapers, or even to students. An extension of the *Hazelwood* rule to the university level would also chill faculty members' exercise of First Amendment rights. The *Hazelwood* opinion has been used in the lower courts to restrict teacher freedoms. Peltz, 68 Tenn. L. Rev. at 483 (noting that "*Hazelwood* has served as a springboard for lower courts to allow executive inroads not only into other student constitutional freedoms, but also into ... teachers' academic freedom.").

The Seventh Circuit's extension of *Hazelwood* to the college level could be expected to have a similar effect on university teachers. Peltz, 68 Tenn. L. Rev. at 534 (noting that "there would be little reason to think that the tradition of academic freedom in American higher education – despite the approval of case law – is any more than a professional courtesy that college administrators may lawfully disregard on pedagogical grounds") (citation omitted). The Supreme Court should grant review in order to forestall such an outcome, and to reaffirm the view expressed in *Healy* that:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The

> college classroom with its surrounding environs is peculiarly the "marketplace of ideas," and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

Healy, 408 U.S. at 180-81 (internal quotation marks and citations omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

MARGARET L. HOSTY, JENI S. PORCHE, AND STEVEN P. BARBA,

Petitioners,

v.

PATRICIA CARTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief of *Amici Curiae* Student Press Law Center, Associated Collegiate Press, College Media Advisers, Community College Journalism Association, Society for Collegiate Journalists, Reporters Committee for Freedom of the Press, American Society of Newspaper Editors, National Newspaper Association, Newspaper Association of America, Society of Professional Journalists, Associated Press Managing Editors, College Newspaper Business and Advertising Managers, National Federation of Press Women, National Lesbian and Gay Journalists Association and the Independent Press Association/Campus Journalism Project in Support of Petition of Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba for Writ of Certiorari

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Brief of *Amici Curiae* in Support of Petition of Margaret L. Hosty, Jeni S. Porche, and Steven P. Barba for Writ of Certiorari

INTEREST OF *AMICI CURIAE* IN THIS CASE[1]

The *Amici Curiae*'s Interest

Amici, identified in the attached Appendix, represent student media, journalism educators and professional journalists. These individuals and organizations come to this Court to voice their grave concern about the consequences of the decision of the United States Court of Appeals for the Seventh Circuit entered in this case. Because of the exceptional importance of this case for the future of free expression and thoughtful debate on public college and university campuses and the training and preparation of young journalists, *Amici* respectfully request the Court to review, reconsider and reject the ruling.

STATEMENT OF FACTS

On November 1, 2000, Patricia A. Carter, dean of student affairs at Governors State University, called the printer of the student newspaper, the *Innovator*, and demanded that she or another GSU official be allowed to read and approve the newspaper prior to publication. The

[1] Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than the *Amici Curiae*, their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for all Petitioners and Respondents have consented to the filing of this brief.

Innovator's student editors refused Carter's demands. The *Innovator*, which had published a number of stories and editorials critical of the GSU administration just prior to the censorship, has not been published since.

SUMMARY OF ARGUMENT

The *Hazelwood* First Amendment standard was created specifically for high school student expression and is inappropriate for college and university students. This country's intellectual legacy exemplifies the fundamental role the First Amendment has played in preserving the "marketplace of ideas" on our college campuses. Extension of *Hazelwood*'s standard to college campuses — and specifically to college student media — would have disastrous consequences. The *Hazelwood* standard is vague and difficult to apply outside the specific context in which it arose. Based on our observations of *Hazelwood*'s impact on student journalism at public high schools, *amici* fear that the extension of *Hazelwood* to college campuses will result in a significant increase in threats of censorship and the curtailment of debate on controversial issues, as well as meaningful criticism of government officials and policies. Indeed, less than four months after the *Hosty* decision was handed down, its effect is already being felt beyond the Seventh Circuit.

ARGUMENT

Introduction

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), this Court explicitly left open the question of whether the First Amendment standard it adopted for school-sponsored speech of school children at the high school and

elementary school level would be appropriate with respect to censoring such speech by students attending public colleges and universities. Because of the growing confusion and conflict among the lower courts on this important question, *amici* believe the time has come for this Court to provide an answer.

In this case, the Seventh Circuit held that both the framework[2] of the *Hazelwood* decision — as well its deference to school officials acts of censorship[3] — should be applied to limit adult student speech in a subsidized student newspaper on a public college or university campus. The Seventh Circuit's ruling cannot be reconciled with this Court's decision in *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), in which the Court held that the First Amendment prohibits a public university from denying funding to a student publication because of its religious or political message. Under the Seventh Circuit's decision in *Hosty*, once the student publication at issue in *Rosenberger* accepted any funding, the university could demand both the right to review the publication and to censor its content as a means of disassociating the school from political controversy.

For almost two centuries, editorially independent, student-edited publications at public and private colleges and universities have been a vital component of campus life in

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2 *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc).

3 *Id.* at 734-735. ("To the extent that justification depends on … the desire to ensure 'high standards for the student speech that is disseminated under [the school's] auspices' … but also the goal of disassociating the school from 'any position other than neutrality on matters of political controversy,' there is no sharp difference between high school and college papers.") (citations omitted).

the United States.[4] As counterparts to the professional media in American society at large, college journalists act as independent watchdogs of student governments and university administrators, ensuring that student and public money is wisely spent, policy decisions thoughtfully made and campus justice equitably administered. A key part of virtually every university campus in the nation,[5] college student newspapers play a crucial role in ensuring a true "marketplace of ideas" exists at an institution of higher education. As a supplement to the professional media, college journalism also serves the wider community by monitoring the administration of higher education. College students have a greater stake than anyone in the conduct of government on campus and they have unparalleled access to campus officials and information. Student news organizations are an important training ground for professional journalists.[6]

Most public college student news organizations rely primarily on advertising revenue to support their activities, with less than 28 percent reporting they receive any financial assistance from their college or university's general funds.[7]

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[4] The student newspaper at Miami University of Ohio, *The Miami Student*, claims to be the oldest student newspaper in the United States, established in 1826. From "About Us" on *The Miami Student* Web site (http://miamistudent.collegepublisher.com).

[5] There are approximately 1,627 daily and weekly college student newspapers currently published on American college and university campuses. *Editor & Publisher International Yearbook 2005* at 17-36.

[6] Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons From The 'College Hazelwood' Case*, 68 Ten. L. Rev. 481, 481-482 (2001).

[7] In 2005, 98 percent of college and university newspapers reported revenue from advertising, with 52.7 percent reporting that ad sales accounted for more than half of their annual revenue. *Campus*

However, almost all student publications receive some indirect form of subsidy from their school (office space or use of school-owned equipment and services, for example) that could implicate their rights under the Seventh Circuit's decision.

For more than three decades, student journalists at public colleges and universities have enjoyed the full legal protections of the First Amendment. Following this Court's lead, lower courts have held consistently that any attempt by school officials to censor or control constitutionally protected expression in a university student publication is prohibited even if that publication is sponsored by the school and part of a school-recognized activity. *See Rosenberger*, 515 U.S. 819; *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Bazaar v. Fortune*, 489 F.2d 225 (5th Cir. 1973), *affirming en banc*, 476 F.2d 570 (5th Cir. 1973), *cert. denied*, 416 U.S. 1995 (1974); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1973), *cert. denied*, 430 U.S. 982 (1977); *Bazaar v. Fortune*, 476 F.2d 570, *aff'd en banc*, 489 F.2d 225 (5th Cir. 1973) (per curiam), *cert. denied*, 416 U.S. 995 (1974); *Lueth v. St. Clair County Community College*, 732 F. Supp. 1410 (E.D. Mich. 1990); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 148 (D. Neb. 1986) *aff'd*, 829 F.2d 662 (8th Cir. 1987); *Milliner v. Turner*, 436 So. 2d 1300 (La. Ct. App. 1983), *cert. denied*, 442 So. 2d 453 (La. 1983); *Mazart v. State*, 441

Media Operations (2005), L. Kopenhaver and R. Spielberger [to be published in *College Media Review* (Summer 2005), which is not yet available.] A 2001 version of this survey reported similar findings. L. Kopenhaver and R. Spielberger, *College Media Review*, at 4-11 (Winter 2002).

N.Y.S.2d 600, 605 (N.Y. Ct. Cl. 1981); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 343 N.Y.S.2d 333 (N.Y. 1973); *State Board for Community Colleges v. Olson*, 687 P.2d 429 (Colo. 1984). The Seventh Circuit's decision is in direct conflict with law that has long been regarded as settled. The ruling will have far-reaching consequences for student and faculty speech on college and university campuses within its jurisdiction and beyond.

I. A First Amendment standard specifically created for high school student curricular expression is not appropriate for college and university students.

This Court's decision in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), established a restrictive standard for student First Amendment rights — applicable only in elementary and secondary schools — that was intended to help school officials protect students while they were children. *Id.* at 272 (noting that school officials must be able to take into account the "emotional maturity of the intended audience" in determining whether censorship of student speech is appropriate.) As adults,[8] however, college and university students are entitled to the protection afforded other adults under the First Amendment.

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[8] According to a U.S. Census Bureau survey, only 1 percent of those enrolled in American colleges or universities during the Fall of 2000 were under the age of 18. Fifty-five percent of those enrolled were 22 years of age or older. The full survey is available at: http://chronicle.com/weekly/almanac/2001/nation/0102001.htm.

A. This country's intellectual legacy exemplifies the fundamental role the First Amendment has played in preserving the "marketplace of ideas" in our college campuses.

The University is the paradigmatic "marketplace of ideas," rendering "the vigilant protection of constitutional freedoms...nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (citation omitted). This Court has specifically recognized there is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268-69.

This Court's restrictive First Amendment standard in *Hazelwood* sprung from the premise that the special circumstances of the secondary and elementary school environment permit school authorities to exercise more control over school-sponsored student expression than the First Amendment would otherwise permit. However, the judicial deference necessary in the high school setting and below – and in the factual context of *Hazelwood* – is inappropriate for a university setting. A high school is an entirely different environment from a university. This Court acknowledged such a difference when it explicitly reserved the question of whether the same level of deference to school officials expressed in *Hazelwood* would be "appropriate with respect to school-sponsored expressive activity at the college and university level." *Hazelwood, Id.* at 273, n.7. In fact, every effort to justify censorship of college student media under *Hazelwood* has been rejected by the lower courts except by the Seventh Circuit in *Hosty*. As Justice Souter has noted, the "cases dealing with the right of teaching institutions to limit expressive freedom of students have been

confined to high schools, whose students and their school's relation to them are different and at least arguably distinguishable from their counterparts in college education." *Board of Regents of the Univ. of Wisconsin System v. Southworth,* 529 U.S. 217 (2000) (Souter, J., concurring in the judgment) (citations omitted).

This Court has explicitly recognized that where the "vital" principles of the First Amendment are at stake, "the first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger to speech is from the chilling of individual thought and expression." *Rosenberger v. Rectors and Visitors of the University of Virginia,* 515 U.S. 819, 835-36 (1995). These dangers are especially threatening in the university setting, where "[t]he quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment." *Id.* Yet that right to review and censor a student publication is precisely what the Seventh Circuit has approved in *Hosty.*

Such restrictions have no place at a public college or university. "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life." *Id.* Lower courts have consistently struck down administrative attempts to limit free and robust student expression at the postsecondary level. *Joyner v. Whiting,* 477 F.2d 456 (4th Cir. 1973) (university withdrawal of funding to student publication at North Carolina State University based on editorial condemning integration rejected); *Stanley v. Magrath,* 719 F.2d 279 (8th Cir. 1983) (attempt by

University of Minnesota to change student newspaper funding mechanism after publication of controversial humor issue rejected); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *aff'd with modification*, 489 F.2d 255 (*en banc per curiam*) (University of Mississippi's censorship of student magazine because of "coarse language" and story about interracial love affair rejected). In fact, two appellate courts have explicitly refused to apply *Hazelwood* to college student media. *Student Government Association v. Board of Trustees of the University of Massachusetts*, 868 F. 2d 473, 480 n. 6 (1st Cir. 1989); *Kincaid v. Gibson*, 236 F.3d 342, 346 n. 4-5 (6th Cir. 2001) (en banc).

College student expression should be subject to no greater restrictions than those applicable to the public at large. *Healy*, 408 U.S. at 180. The driving force prompting the enactment of the First Amendment was the founders' unwavering commitment to the freedom of the mind. Nowhere is the mind more provoked, more nurtured, more challenged to new levels of enlightenment than on the university campus. *Hazelwood* did not, and should not be interpreted to have taken these fundamental precepts of college education into account when it diluted high school students' First Amendment rights. Nothing in *Hazelwood* or its progeny should be read to alter the venerated balance favoring free and independent thought on America's college and university campuses.

B. Extension of *Hazelwood*'s standard to college student media would have disastrous consequences.

1. The *Hazelwood* standard is vague and difficult to apply outside the specific factual context in which it arose.

Hazelwood is *sui generis.* Prior to 1988, the standard enunciated in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 513 (1969) (holding that school officials can only censor student expression when they can reasonably forecast a material and substantial disruption of school activities or an invasion of the rights of others) had uniformly been applied to censorship of all student expression at high schools. *See, e.g., Nicholson v. Board of Education,* 682 F.2d 858, 863 n.3 (9th Cir. 1982); *Gambino v. Fairfax County School Board,* 479 F. Supp. 731, 736 *aff'd,* 564 F.2d 157 (4th Cir. 1977) (citing 4th Cir. decisions that rely explicitly on *Tinker*); *Trachtman v. Anker,* 563 F.2d 512, 516 (2nd Cir. 1977), *cert. denied,* 435 U.S. 925 (1978); *Zucker v. Panitz,* 299 F. Supp. 102, 105 (S.D.N.Y. 1969). In *Hazelwood,* however, the Court upheld the decision of a high school principal to censor a high school student newspaper because: (1) the paper was produced by a journalism class and had not been opened by the school as a public forum for student expression; (2) as a nonpublic forum, *Tinker* was inapplicable; rather school officials would be allowed to censor such student speech if their actions were "reasonably related to legitimate pedagogical concerns," *Hazelwood,* 484 U.S. at 273, and (3) the principal's decision to prevent the publication of the articles was reasonably related to legitimate pedagogical concerns. The *Hazelwood* Court found it key that the student

speech at issue occurred in a school-sponsored student newspaper produced as part of a journalism class. It was also significant, the majority found, that the newspaper contained material that might be viewed as being endorsed by the school. Such factors, the Court said, permitted high school officials to exercise greater control over student expression than would be permitted under the more protective *Tinker* standard, which the Court concluded applied only to non-school-sponsored, independent student speech or speech in a designated public forum.

Hazelwood drastically shifted the balance. Where the First Amendment once required school officials to show that student speech was materially and substantially disruptive to normal school activities — or otherwise unlawful — *Hazelwood*, where it applied, now permitted a high school official to censor student speech that he or she deemed to be, for example, "poorly written," "biased or prejudiced," or thought to advocate "conduct otherwise inconsistent with 'the shared values of a civilized social order.'" *Hazelwood*, 484 U.S. at 271-272.

By any measure, the *Hazelwood* decision has given high school and elementary school officials far greater authority to censor the otherwise lawful speech of private citizens than is extended to any other group of government officials, except perhaps prison wardens. *See e.g., In re Williams*, 205 Cal. Rptr. 903 (Cal. App. 1984) (state may censor prison newspapers where prison officials can demonstrate actions achieve "legitimate penological objective.")

Courts continue to point to the expansive authority of *Hazelwood* in upholding administrative censorship of high school student and faculty speech in surprising ways and a

variety of contexts. *Phillips v. Oxford Separate Mun. School Dist.*, 314 F.Supp.2d 643 (N.D.Miss. 2003) (censorship of religious-oriented student government campaign poster); *Brandt ex rel. Brandt v. Board of Educ. of City of Chicago*, 326 F.Supp.2d 916, 921 (N.D. Ill. 2004) (ban on individual student T-shirts allowed where school officials can demonstrate ban is "reasonably related to legitimate pedagogical concerns"); *Bannon v. School Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (censorship of student murals containing religious words and phrases); *Fleming v. Jefferson County School Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003) (censorship of student-designed wall tiles with religious themes); *Walz ex rel. Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271 (3rd Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (censorship of pencils and candy canes handed out to kindergarten classmates with religious message attached); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 813 (1998) (upholding transfer of high school drama teacher after selecting controversial play for drama competition).

While some have argued that *Hazelwood* is best explained "in terms of the school's power to control its communicative resources [when these resources are a part of the official school curriculum], rather than as a power to regulate students' speech," William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 Iowa L. Rev. 505, 513 (1989), seventeen years of living with *Hazelwood* have shown that school officials and other state actors have not read the decision so narrowly, using it to justify the regulation of virtually any form of teacher and student speech.

Lower courts, too, have had great difficulty determining what, exactly, the *Hazelwood* standard is and how to apply it. This difficulty is exemplified by the New Jersey Supreme Court's decision in *Desilets v. Clearview Regional Board of Education*, 647 A.2d 150, 154 (N.J. 1994). In that case, the trial court summarily held that a junior high school principal's censorship of two movie reviews from a student newspaper was reasonably related to a legitimate pedagogical concern under *Hazelwood*. The appellate court reversed this portion of the trial court's holding and the New Jersey Supreme Court affirmed the appellate court. Although the high court agreed the movie reviews "[did] not appear to raise educational concerns that call for the kinds of editorial control exemplified by the Supreme Court in *Hazelwood*," it was unsure what exactly the *Hazelwood* standard meant. *Id.* at 154. The court noted the "inherent complexity surrounding the nature and scope of educational policy affecting expressional activity" and wished for guidance from the state educational agency. *Id.* *See also*, Martha M. McCarthy, *Post Hazelwood Developments: A Threat To Free Inquiry In Public Schools*, 81 Ed. Law. Rep. 3, 689 (June 1993) and cases cited therein.

2. There has been an increase in censorship of high school student journalism after *Hazelwood*.

Following *Hazelwood*, some commentators warned of the censorship "tsunami" that was likely to follow.[9] That prediction has not been far off. One result of the *Hazelwood*

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[9] J. Marc Abrams and S. Mark Goodman, Comment, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 Duke L.J. 706, 728.

decision, for example, has been a sharp rise in high school censorship incidents reported to the Student Press Law Center (SPLC), a non-profit group that provides help and information to American high school and college student media. By the end of 2003, for example, calls to the SPLC from student journalists and their advisers seeking legal help had risen 331 percent since the court's 1988 ruling.[10] Although *Hazelwood* requires that school officials who choose to censor must provide a valid educational reason for their censorship, calls to the SPLC show many administrators have apparently interpreted the decision as providing them with an unlimited license to censor anything they choose. For example:

- In New York, a principal censored an accurate story from the student newspaper after it reported there were only two working bathrooms in a high school of 3,600 students.[11]

- In Indiana, a principal censored a story that painstakingly detailed how the girls' tennis coach had improperly pocketed more than $1,000 that team members had paid for court time. All agreed the story was accurate.[12]

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[10] The Student Press Law Center legal staff received 548 calls for legal help in 1988. By 2003, that number had risen to 2,360.

[11] *High School Confidential*, Brills Content, June 2001, p. 118-119.

[12] *See Death by Cheeseburger: High School Journalism in the 1990's and Beyond*, Freedom Forum (Arlington, Va.), 1994, pp. 113-15.

Examples such as these, and *many* others like them,[13] reveal that public high school officials have often relied on *Hazelwood* to censor student speech with relative impunity. In such cases, a student publication ceases to be a tool for teaching journalism or an exercise in democracy and becomes merely a public relations tool of the administration. When censorship can be justified by public school officials simply by their claiming a story is "poorly written," "biased," "inconsistent with the shared values of a civilized social order" or that they have some other weakly defined "legitimate pedagogical concern," the shield of the First Amendment is but a sieve.

Maintaining the college campus as a true marketplace of ideas demands that *Hazelwood* be limited to its own facts and not extended to the university setting. As one court has stated:

> "[B]ecause *Hazelwood* opens the door to significant curtailment of cherished First Amendment rights, this court declines to read the decision with the breadth its dictum invites. Because educators may limit student expression in the name of pedagogy, courts must avoid enlarging the venues within which that rationale may legitimately obtain without a clear and precise directive."

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[13] *See, e.g.*, Kaplan, J., *Hazelwood decision continues to haunt high school journalists*, Editor and Publisher, May 7, 1994, p. 48. See also, the Student Press Law Center Web site (http://www.splc.org), which includes hundreds of examples of student media censorship occurring at schools across the country.

Romano v. Harrington, 725 F. Supp. 687, 689 (E.D.N.Y. 1989).

3. Some of the best reporting being produced by college journalists today could be subject to censorship under *Hazelwood*.

In contrast to many high school censorship incidents, public college administrators today are less likely to be successful in their efforts to restrict the student press. This is usually (and perhaps only) because of the First Amendment protections that courts have consistently accorded college journalists. That circumstance would surely change were *Hazelwood* extended to limit the rights of college student journalists. Among some of the stories in college student publications that could be subject to censorship under the *Hazelwood* standard:

- An opinion piece opposing an upcoming referendum that would have provided the college with revenue collected from property taxes. University officials, claiming the paper contained typographical and grammatical errors, confiscated and destroyed 10,000 copies of the paper. After students threatened legal action, the school agreed to reprint the newspaper.[14]

- An article detailing the incoming university president's expenditure of state funds, including more than $100,000 spent to remodel the president's home and pay for

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[14] Miami-Dade Community College (FL) *Catalyst*, July 22, 1992 (as reported in the Student Press Law Center Report, Winter 1992-93, at 34).

his inauguration. Following publication, the president transferred the newspaper's adviser to another position at the school, an act that generated considerable public attention. The president later resigned after being questioned by state legislators regarding the spending that had been reported in the student newspaper. The adviser was reinstated.[15]

• A yearbook story reporting that members of the school's volleyball team were removed for bringing alcohol on a team trip and a feature spread on sex and relationships. Following publication, the yearbook editor lost his job. After the editor sued, the school agreed to a settlement in which it paid the editor $10,000 and agreed to a publications policy that prohibited administrative interference with the content of student publications.[16]

• An editorial cartoon, featuring cartoon figures as university officials, commenting on a U.S. Department of Education report that found the school had misused public funds when it paid for a trip to Disney World by students and school officials. One of those portrayed, the vice president of student affairs, temporarily halted printing of the issue — but released them after students objected.[17]

If *Hazelwood* is allowed to determine the level of First Amendment protection to which America's college student media are entitled, there is no doubt university administrators are poised to take advantage of their new

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[15] Northern Illinois University, *Northern Star*, June 1985 (as reported in the Student Press Law Center Report, Fall 1987, at 24).

[16] University of Southwestern Louisiana, *L'Acadien*, (1991), at 12, 219 (as reported in Student Press Law Center Report, Fall 1994, at 29).

[17] West Virginia State University *The Yellow Jacket*, Jan. 27, 1994 (as reported in the Student Press Law Center *Report*, Spring 1994, at 25).

censorship powers. Word has already begun to spread that the standard "hands-off student media" policies recognized by college officials in the past may no longer be required. In California, for example — 2,000 miles west of the Governors State University campus and far beyond the jurisdiction of the Seventh Circuit — administrators at California State University system schools received a memo from the system's legal counsel on June 30, 2005 — ten days after the Seventh Circuit handed down its decision — informing them that "[*Hosty*] appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers...."[18]

Extending *Hazelwood* to the university setting is a recipe for encouraging censorship that would dramatically hinder the production of good journalism and the training of good journalists. *Amici* do not believe this Court intended the censorship of college and university student newspapers to be the legacy of *Hazelwood*.

CONCLUSION

For the forgoing reasons, *Amici* respectfully request that the Petition of Margaret L. Hosty, Jeni S. Porsche, and Steven P. Barba for Writ of Certiorari be granted.

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[18] C. Helwick, Memorandum to CSU University Presidents (June 30, 2005); Student Press Law Center, *Memo linking California with Hosty decision worries students*, SPLC NewsFlash, September 15, 2005 (available online at: http://www.splc.org/newsflash.asp?id=1064&year.

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APPENDIX

Identification of the *Amici Curiae*

The Student Press Law Center, Associated Collegiate Press, College Media Advisers, Community College Journalism Association, Society for Collegiate Journalists, Reporters Committee for the Freedom of the Press, American Society of Newspaper Editors, National Newspaper Association, Newspaper Association of America, Society of Professional Journalists, Associated Press Managing Editors, College Newspaper Business and Advertising Managers, National Federation of Press Women, National Lesbian and Gay Journalists Association and the Campus Journalism Project include and represent every major national organization of college journalists and college media advisers as well as organizations representing professional journalists and the news organizations they work for, and thus have a particular interest in the ultimate resolution of this case.

The Student Press Law Center is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the free expression rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the student press, the Center has collected information on student press cases nationwide and has submitted various amicus briefs, including to this Court and many federal courts of appeal.

The Associated Collegiate Press is a division of the National Scholastic Press Association, a 501(c)(3) non-profit association of student media groups at colleges, universities

and secondary schools throughout the United States and in several other countries. Founded in 1921, the college/ university division represents about 700 media organizations and more than 20,000 student journalists. The associations provide journalism education and recognition opportunities for their members, including reporting competitions and programs on press law and ethics.

College Media Advisers, with more than 750 members, has a 48-year history of representing the people who advise the nation's collegiate newspapers, yearbooks, magazines and electronic media. This organization endorses student press freedom as guaranteed by the First Amendment of the U.S. Constitution and has long held that a free an unencumbered student press serves the learning environment of an academic community far better than a student press which is restrained by prior review and censorship.

The Community College Journalism Association is an international organization that fosters the improvement of journalism instruction in higher education, especially in two-year institutions. Founded in 1968, CCJA is dedicated to the precept that community college journalism education must seek high standards in the preparation of men and women for effective careers in mass media.

The Society for Collegiate Journalists is the nation's oldest journalism honorary society for college students, founded in 1909 at Syracuse University. We subscribe to the Code of Ethics for the Society of Professional Journalists and encourage the free expression of editors and managers of collegiate media. Over the years SCJ and its predecessor organizations have represented more than 200 colleges and universities and tens of thousands of student and honorary members.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a non-profit organization founded in 1922. It has a nationwide membership of approximately 850 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Newspaper Association of America (NAA) is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The National Newspaper Association (NNA) is a 2,500-member organization representing community newspapers across the United States. Founded in 1885, it is the oldest national organization for newspapers. Its missions include a vigorous defense of First Amendment free press rights. NNA maintains offices in Columbia, Missouri and Arlington, Virginia.

The Society of Professional Journalists is the largest and most broad-based journalism organization in the United States, with a membership consisting of professional working journalists, college and university professors and student journalists. The Society is committed to encouraging the free practice of journalism, improving the quality of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects the guarantees of freedom of speech and press found in the First Amendment to the United States Constitution.

Associated Press Managing Editors was formed in 1933 as a national association for editors in the United States and Canada whose newspapers subscribe to the Associated Press. The organization provides oversight of AP's news coverage. It also provides guidance and counsel to editors and advocates on behalf of First Amendment principles. The latter is the source of our interest in this case.

College Newspaper Business and Advertising Managers is a national organization of college newspaper business staffs. Founded in 1972, CNBAM represents more than 120 student newspapers with a circulation of over 1.4 million and more than $50 million in annual sales. Their annual conference brings together students, professional staff members and industry experts to discuss advertising trends and exchange ideas. The organization also provides education opportunities and recognition to student sales staffs through their annual advertising contest.

The National Freedom of Press Women represents 1,500 women and men in various communications professions. Its purposes are to advance the communications professions, provide for exchange of ideas, knowledge and experiences in communications, and coordinate efforts of interest to women communications professionals. It offers regular education and professional development programs for journalists, including high school and college media advisers.

The National Lesbian and Gay Journalists Association (NLGJA) is a 501(c)(3) non-profit organization of 1,300 members in 24 chapters nationwide, with affiliations in Canada and Germany. Founded in 1990, NLGJA is an organization of journalists, media professionals, educators and students who work within the media industry to foster fair and accurate coverage of lesbian, gay, bisexual and transgender issues. NLGJA provides professional development to its members and opposes all forms of workplace bias.

The Independent Press Association is a nonprofit media reform organization, with more than 500 member publications, that seeks to amplify the power of the independent press in order to foster a more just, open, and democratic society. Its Campus Journalism Project trains students to create and improve independent media, and has helped students defend freedom of the college press since 1995.